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TABLE OF CONTENTS

Judges of the Court of Appeals	v
Superior Court Judges.....	vi
District Court Judges.....	viii
Attorney General.....	xii
District Attorneys	xiii
Public Defenders	xiv
Table of Cases Reported	xv
Cases Reported Without Published Opinion	xix
General Statutes Cited and Construed.....	xxii
Rules of Civil Procedure Cited and Construed.....	xxv
Constitution of United States Cited and Construed	xxv
Rules of Appellate Procedure Cited and Construed.....	xxv
Disposition of Petitions for Discretionary Review	xxvi
Opinions of the Court of Appeals.....	1-711
Analytical Index.....	715
Word and Phrase Index.....	745

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CASES REPORTED

	PAGE
Allison v. Allison	622
Allison, Insurance Co. v.....	654
Allstate Insurance, Murray v.	10
Alva v. Cloninger	602
American and Efird Mills, Smith v.....	480
American Clipper Corp. v. Howerton.....	539
American Motors Corp., Gillespie v.....	535
Atkinson, S. v.....	683
 Banasik, Norman v.	197
Barnes, Cantey v.	356
Berry, S. v.	97
Black, S. v.	687
Blue Jeans Corp. v. Pinkerton, Inc.	137
Board of Education, Overton v.....	303
Boggs, S. v.....	511
Bone International, Inc. v. Brooks.....	183
Boyce v. Boyce	422
Brindle, Hawks v.....	19
Brooks, Bone International, Inc. v.	183
Brooks, S. v.	90
Brown, Cunningham v.	264
Browning, In re	161
Brunson, S. v.	413
Burrow v. Jones	549
Bynum International, Inc., Uniform Service v.....	203
Byrd v. Byrd	707
 Campbell v. Church.....	393
Campbell, S. v.....	418
Cantey v. Barnes	356
Carolina-Atlantic Distributors v. Teachey's Insulation	705
Carpenter, Hasty v.....	333
Cason, S. v.	144
Central Transport, Smith v.	316
Cherry S. v.....	118
Church, Campbell v.....	393

	PAGE
City of Greensboro, Jones v.	571
City of Washington, Mayo v.	402
Clements, S. v.....	113
Cleveland, S. v.	159
Cloninger, Alva v.	602
Clontz, S. v.....	639
Coasey, S. v.....	450
Coley v. Eudy.....	310
Colonial Life & Accident Insurance Co., McGee v.	72
Comr. of Motor Vehicles, Sermons v.	147
Condie v. Condie.....	522
Cooper, S. v.....	233
Cornell, S. v.....	108
Costigan, S. v.	442
Coulbourn Lumber Co. v. Grizzard.....	561
Cunningham v. Brown.....	264
 Daniels, S. v.	294
Dobson, S. v.....	445
Dodge, Inc., Duffer v.....	129
Donald, S. v.....	238
Douglas, S. v.....	594
Dri-Spray Division Equipment Development, Strickland v.	57
Duffer v. Dodge, Inc.	129
Duke Power Co., Utilities Comm. v.	698
 Easter, S. v.	190
Education, Board of, Overton v.	303
Environmental Management Comm., High Rock Lake Assoc. v.....	275
Equipment Development, Strickland v.....	57
Eudy, Coley v.....	510
 Fennell, S. v.	460
Fenner, S. v.....	156
Financial Corp. v. Harnett Transfer	1
First Baptist Church of the City of Durham, Campbell v.....	393
First Citizens Bank v. Holland ..	529

CASES REPORTED

	PAGE
First Union Natl. Bank, Pedwell v.	236
Fungaroli v. Fungaroli	363
Furniture Co., Yelverton v.	675
Furniture Industries, Yelverton v.	215
Gibson, Town of Sylva v.	545
Gillespie v. American Motors Corp.	535
Glenn, S. v.	694
Goldsboro City Board of Education, Overton v.	303
Greene v. Lynch, Sec. of Revenue.....	665
Greensboro, City of, Jones v.	571
Grier, S. v.	209
Griffin, S. v.	564
Grizzard, Lumber Co. v.	561
Guill, Shugar v.	466
 Harnett Transfer, Financial Corp. v.	1
Harper, S. v.	493
Harris v. Harris	103
Hasty v. Carpenter	333
Hawks v. Brindle	19
Heffner, Roberts v.	646
Helms v. Prikopa	50
Henredon Industries, McNinch v.	250
High Rock Lake Assoc. v. Environmental Management Comm.	275
Hill v. Lassiter	34
Hill v. Smith.....	670
Hodges, S. v.	229
Holland, First Citizens Bank v.	529
Howard, Thomas v.	350
Howell, S. v.	507
Howerton, American Clipper Corp. v.	539
Human Resources, Sec. of, Lyons v.	679
In re Browning.....	161

	PAGE
In re McElwee.....	163
In re Meaut	153
In re Plushbottom and Peabody	285
In re Wake Forest University.....	516
Insurance Co. v. Allison	654
Insurance Company, McGee v.	72
Insurance Co., Murray v.	10
 Jacobs, Pope v.	374
Jacobs, S. v.	324
Jaudon v. Swink	433
Johnson, N.C. Grange Ins. Co. v.	447
Jones, Burrow v.	549
Jones v. City of Greensboro	571
Jorgenson, S. v.	425
 Keadle, S. v.	660
Kemp Furniture Co., Yelverton v.	675
Kemp Furniture Industries, Inc., Yelverton v.	215
 Lassiter, Hill v.	34
Lednum, S. v.	387
Lee, S. v.	344
Little, S. v.	64
Looper v. Looper	569
Lowe v. Peeler.....	557
Lumber Co. v. Grizzard.....	561
Lynch, Sec. of Revenue, Greene v.	665
Lyons v. Morrow, Sec. of Human Resources	679
 McAdams, S. v.	140
McElwee, In re	163
McGee v. Insurance Company	72
McNinch v. Henredon Industries	250
McQueen, Seaman v.	500
Mayo v. City of Washington.....	402
Mazzacco v. Purcell.....	42
Meaut, In re.....	153

CASES REPORTED

	PAGE
Mechanics and Farmers Bank, Rosenstein v.	437
Moore, S. v.	26
Morrow, Sec. of Human Resources, Lyons v.	679
Murray v. Insurance Co.	10
Nationwide Mutual Insurance Co. v. Allison	654
Nickels v. Nickels.	690
Noell v. Winston	455
Norman v. Banasik.	197
N.C. Environmental Management Comm., High Rock Lake Assoc. v.	275
N.C. Grange Ins. Co. v. Johnson	447
N.C. State Comr. of Motor Vehicles, Sermons v.	147
N.C. State Sec. of Human Resources, Lyons v.	679
N.C. State Sec. of Revenue, Greene v.	665
Overton v. Board of Education ..	303
Owen, S. v.	429
Paccar Financial Corp. v. Harnett Transfer	1
Pace, S. v.	79
Pallet Co. v. Wood.	702
Parrish, Sugg v.	630
Pedwell v. First Union Natl. Bank	236
Peeler, Lowe v.	557
Peters, Comr. of Motor Vehicles, Sermons v.	147
Phillips, Trucking Co. v.	85
Pinkerton, Inc., Blue Jeans Corp. v.	137
Plushbottom and Peabody, In re	285
Plymouth Pallet Co. v. Wood	702
Pope v. Jacobs	374
Powell, S. v.	224
Power Co., Utilities Comm. v.	698
Prikopa, Helms v.	50
Purcell, Mazzacco v.	42

	PAGE
Rental Towel and Uniform Service v. Bynum International, Inc.	203
Rick, S. v.	383
Roberts v. Heffner.	646
Roberts, S. v.	221
Robinson, S. v.	567
Rosenstein v. Mechanics and Farmers Bank	437
Royal Dodge, Inc., Duffer v.	129
Seaman v. McQueen	500
Sec. of Human Resources, Lyons v.	679
Sec. of Revenue, Greene v.	665
Sermons v. Peters, Comr. of Motor Vehicles	147
Shugar v. Guill	466
Simmons, S. v.	440
Simmons, Yates Motor Co. v.	339
Smith v. American and Efird Mills.	480
Smith v. Central Transport.	316
Smith, Hill v.	670
Snowden, S. v.	511
Spell, Williams v.	134
Spruill v. Summerlin	452
Stanley v. Stanley	172
S. v. Atkinson	683
S. v. Berry.	97
S. v. Black.	687
S. v. Boggs	511
S. v. Brooks.	90
S. v. Brunson.	413
S. v. Campbell	418
S. v. Cason.	144
S. v. Cherry.	118
S. v. Clements	113
S. v. Cleveland.	159
S. v. Clontz	639
S. v. Coasey.	450
S. v. Cooper.	233
S. v. Cornell	108
S. v. Costigan.	442
S. v. Daniels	294
S. v. Dobson	445
S. v. Donald	238

CASES REPORTED

	PAGE
S. v. Douglas	594
S. v. Easter	190
S. v. Fennell	460
S. v. Fenner	156
S. v. Glenn	694
S. v. Grier	209
S. v. Griffin	564
S. v. Harper	493
S. v. Hodges	229
S. v. Howell	507
S. v. Jacobs	324
S. v. Jorgenson	425
S. v. Keadle	660
S. v. Lednum	387
S. v. Lee	344
S. v. Little	64
S. v. McAdams	140
S. v. Moore	26
S. v. Owen	429
S. v. Pace	79
S. v. Powell	224
S. v. Rick	383
S. v. Roberts	221
S. v. Robinson	567
S. v. Simmons	440
S. v. Snowden	511
S. v. Stephens	244
S. v. Vaughan	408
S. v. Washington	458
S. v. Watson	369
S. v. Whitfield	241
S. v. Williams	397
S. v. Williams	613
S. ex rel. Utilities Comm. v. Power Co.	698
State Comr. of Motor Vehicles, Sermons v.	147
State Sec. of Human Resources, Lyons v.	679
State Sec. of Revenue, Greene v.	665
Stephens, S. v.	244
Stephens v. Worley	553
Strickland v. Equipment Development	57
Sugg v. Parrish	630

	PAGE
Summerlin, Spruill v.	452
Swink, Jaudon v.	433
Sylva, Town of v. Gibson	545
Teachey's Insulation, Carolina- Atlantic Distributors v.	705
Thomas v. Howard	350
Tire Sales & Service, Walters v.	378
Town of Sylva v. Gibson	545
Trucking Co. v. Phillips	85
Uniform Service v. Bynum International, Inc.	203
Utilities Comm. v. Power Co.	698
Vaughan, S. v.	408
Vance Trucking Co., Inc. v. Phillips	85
Wake Forest University, In re ...	516
Wakefield, Whitfield v.	124
Walters v. Tire Sales & Service	378
Washington, City of, Mayo v.	402
Washington, S. v.	458
Watson, S. v.	369
Whitfield, S. v.	241
Whitfield v. Wakefield	124
Williams v. Spell	134
Williams, S. v.	397
Williams, S. v.	613
Williford v. Williford	150
Winston, Noell v.	455
Wood, Pallet Co. v.	702
Worley, Stephens v.	553
Yates Motor Co. v. Simmons	339
Yelverton v. Furniture Co.	675
Yelverton v. Furniture Industries	215

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE
Allen, S. v.....	247
Anderson, S. v.	249
Armstrong Supply Corp. v. Coker Heating & Air Cond.....	464
Arthur, S. v.....	464
 Barnett, S. v.....	465
Beakey v. Beakey	464
Bennett, S. v.....	247
Berry, S. v.....	247
Bethea, S. v.....	465
Brooks, S. v.....	247
Brown's Cabinets v. Mfg. Enterprises.....	248
Bryant v. Lowery.....	710
Bunting, S. v.....	249
Byrd, S. v.....	247
Byrd & Johnson, S. v.....	710
 Campbell, S. v.....	710
Carolina Builders Corp. v. Marvin Wright & Co., Inc....	711
Carson, Hummel v.	249
Carter, v. Gray	710
Carver, S. v.....	247
City of Mt. Holly v. Walker.....	247
Coker Heating & Air Cond., Armstrong Supply Corp. v. ..	464
Collins, S. v.....	247
Colvard v. Williams	249
Corriher v. Corriher	711
Culbreth, S. v.	247
 Dickerson, S. v.....	710
Dizor, S. v.....	247
Doerner, S. v.....	248
Doncaster Collar & Shirt Co., Hall v.....	464
Duncan, S. v.....	710
Dunlap, S. v.....	465
 Edwards, S. v.....	465
Elder, S. v.....	248
Ellerbe, S. v.....	249
Ellis, Potts v.....	464
Eure, S. v.....	249

	PAGE
Fleming, S. v.....	465
Fliehr v. Indian Trail Air Service	464
Frodge, S. v.	465
 Garrett, S. v.	465
Gilbert Engineering v. Porter	464
Gilliam v. Holden	464
Gray, Carter v.	710
Gurley, S. v.	249
 Hale, In re.....	464
Hall v. Doncaster Collar & Shirt Co.	464
Hammock, S. v.....	711
Harper, S. v.....	710
Harrison, S. v.....	465
Henson & Barber, S. v.	249
Hicks, S. v.	710
Higbee v. Higbee	710
Hill v. Hill	464
Hines, S. v.	248
Holden, Gilliam v.	464
Hooper, S. v.....	711
Hummel v. Carson	249
Hunt, S. v.....	465
Hurst, S. v.	711
 Indian Trail Air Service, Fliehr v.....	464
In re Hale	464
In re Leakan	464
In re Owen	710
 Jarratt v. Jarratt.....	464
Johnson v. Johnson.....	710
Johnson, S. v.....	248
Jordan, S. v.	248
 Kirby, S. v.	710
Knight v. Knight	710
 Leakan, In re.....	464
Long, S. v.....	248
Lowery, Bryant, v.	710

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE
McKenzie, S. v.	248
McRae, S. v.	249
Markuson v. Markuson	247
Marvin Wright & Co., Inc., Carolina Builders Corp. v.	711
Matthews, S. v.	465
Mercer, S. v.	465
Mfg. Enterprises, Brown's Cabinets v.	248
Miller, S. v.	711
Moncus v. Willis	247
 Norton, S. v.	711
 Oldham, S. v.	249
Owen, In re.	710
Owens, S. v.	249
Oxendine, S. v.	248
 Parker, S. v.	711
Peterson, S. v.	711
Porter, Gilbert Engineering v.	464
Potter v. Potter.	464
Potts v. Ellis.	464
 Reams, S. v.	249
Remca, Stewart v.	711
Reynolds v. Reynolds.	711
Richardson, S. v.	249
Rogers, S. v.	711
Rollins v. Rollins	249
 Sabir, S. v.	248
Shaw, S. v.	248
Shaw, S. v.	248
Smith v. Smith	247
Smith, S. v.	249
Smith, S. v.	465
Southern, S. v.	711
S. v. Allen	247
S. v. Anderson	249
S. v. Arthur	464
S. v. Barnett.	465
S. v. Bennett	247
S. v. Berry	247
S. v. Bethea	465

	PAGE
S. v. Brooks.	247
S. v. Bunting	249
S. v. Byrd	247
S. v. Byrd & Johnson	710
S. v. Campbell	710
S. v. Carver	247
S. v. Collins	247
S. v. Culbreth.	247
S. v. Dickerson.	710
S. v. Dizor	247
S. v. Doerner	248
S. v. Duncan	710
S. v. Dunlap	465
S. v. Edwards.	465
S. v. Elder	248
S. v. Ellerbee	249
S. v. Eure	249
S. v. Fleming	465
S. v. Frodge	465
S. v. Garrett	465
S. v. Gurley	249
S. v. Hammock.	711
S. v. Harper	710
S. v. Harrison.	465
S. v. Henson & Barber.	249
S. v. Hicks	710
S. v. Hines.	248
S. v. Hooper	711
S. v. Hunt	465
S. v. Hurst.	711
S. v. Johnson	248
S. v. Jordan.	248
S. v. Kirby	710
S. v. Long	248
S. v. McKenzie.	248
S. v. McRae	249
S. v. Matthews.	465
S. v. Mercer	465
S. v. Miller.	711
S. v. Norton	711
S. v. Oldham	249
S. v. Owens	249
S. v. Oxendine	248
S. v. Parker	711
S. v. Peterson.	711
S. v. Reams	249

CASES REPORTED WITHOUT PUBLISHED OPINION

	PAGE
S. v. Richardson	249
S. v. Rogers	711
S. v. Sabir	248
S. v. Shaw	248
S. v. Shaw	248
S. v. Smith	249
S. v. Smith	465
S. v. Southern	711
S. v. Taylor	248
S. v. Toney	465
S. v. Walden	249
S. v. Watson	248
S. v. Young	465

	PAGE
Stewart v. Remca	711
Taylor, S. v.	248
Toney, S. v.	465
Walden, S. v.	249
Walker, City of Mt. Holly v.	247
Watson, S. v.	248
Williams, Colvard v.	249
Willis, Moncus v.	247
Young, S. v.	465

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-15(b)	Gillespie v. American Motors Corp., 535
1-52	Hill v. Lassiter, 34
1-53	Jones v. City of Greensboro, 571
1-54	Jones v. City of Greensboro, 571
1-56	Hill v. Lassiter, 34
1-277	Boyce v. Boyce, 422
1-539.15	Jones v. City of Greensboro, 571
1-567.13(a)(2)	Thomas v. Howard, 350
1A-1	See Rules of Civil Procedure <i>infra</i>
6-21.1	Yates Motor Co. v. Simmons, 339
6-21.2	Town of Sylva v. Gibson, 545
7A-27	Cunningham v. Brown, 264
7A-455	State v. Washington, 458
14-39(a)	State v. Easter, 190
14-54	State v. Douglas, 594
14-72(b)(2)	State v. Jorgenson, 425
14-72(b)(4)	State v. Robinson, 567
14-113.9(a)(1)	State v. Brunson, 413
14-202.1(a)(1)	State v. Campbell, 418
15-176	State v. Berry, 97
15A-256	State v. Brooks, 90
15A-282	State v. Daniels, 294
15A-701	State v. Berry, 97
15A-701(al)(1)	State v. Moore, 26
15A-701(b)	State v. Vaughan, 408
15A-701(b)(7)	State v. Daniels, 294
15A-701(b)(8)	State v. Berry, 97
15A-702	State v. Cornell, 108
15A-902	State v. Berry, 97
15A-922(f)	State v. Clements, 113
15A-952(d)	State v. Brunson, 413
15A-954(a), (c)	State v. Brunson, 413
15A-979(c)	State v. Dobson, 445
15A-1002(b)(2)	State v. Jacobs, 324
15A-1214	State v. Stephens, 244
15A-1214(a)	State v. Campbell, 418
15A-1216	State v. Stephens, 244
15A-1217(b)(1)	State v. Campbell, 418

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
15A-1221(3)	State v. Stephens, 244
15A-1342(g)	State v. Cooper, 233
15A-1343(b)(15)	State v. Howell, 507
15A-1443	State v. Powell, 224
20-16.2(a)	Sermons v. Peters, Comr. of Motor Vehicles, 147
20-52.1	American Clipper Corp. v. Howerton, 539
20-52.1(c)	American Clipper Corp. v. Howerton, 539
20-138(b)	State v. Donald, 238
20-139.1	State v. Simmons, 440
20-140(c)	State v. Donald, 238
20-141(m)	State v. Clements, 113
20-158	State v. Griffin, 564
20-340 et seq.	Duffer v. Dodge, Inc., 129
20-343	Duffer v. Dodge, Inc., 129
22-1	Bone International, Inc. v. Brooks, 183
25-2-725	Gillespie v. American Motors Corp., 535
25-3-415(5)	Lowe v. Peeler, 557
25-9-503	Financial Corp. v. Harnett Transfer, 1
30-1(c)	Greene v. Lynch, Sec. of Revenue, 665
42-15	Sugg v. Parrish, 630
44A-1 et seq.	Financial Corp. v. Harnett Transfer, 1
44A-2(d)	Financial Corp. v. Harnett Transfer, 1
44A-6	Financial Corp. v. Harnett Transfer, 1
49-2	Stephens v. Worley, 553
49-14	Stephens v. Worley, 553
50-13.4	Stanley v. Stanley, 172
50-16.9(b)	Allison v. Allison, 622
50A-7	Pope v. Jacobs, 374
75-1.1(a)	Pedwell v. First Union Natl. Bank, 236
84-4.1	Pope v. Jacobs, 374
87-1	Roberts v. Heffner, 646
90-108(a)(10)	State v. Lee, 344
90-108(b)	State v. Lee, 344
96-14	Yelverton v. Furniture Industries, 215
96-15(h), (i)	In re Browning, 161
97-29	Smith v. American and Efirid Mills, 480
97-30	Smith v. American and Efirid Mills, 480
99A-1	Noell v. Winston, 455

GENERAL STATUTES CITED AND CONSTRUED

G.S.

105-2(1)	Greene v. Lynch, Sec. of Revenue, 665
105-164.7	Carolina-Atlantic Distributors v. Teachey's Insulation, 705
105-278.4(c)	In re Wake Forest University, 516
105-304(f)(4)	In re Plushbottom and Peabody, 285
105-317(c)	In re McElwee, 163
105-374	Town of Sylva v. Gibson, 545
105-374(i)	Town of Sylva v. Gibson, 545
120-146.1	Burrow v. Jones, 549
150A-51	Overton v. Board of Education, 303

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.

12	Hasty v. Carpenter, 333
50(b)(1)	Financial Corp. v. Harnett Transfer, 1
54(b)	Boyce v. Boyce, 422
55(b)(2)	Whitfield v. Wakefield, 124
58	Condie v. Condie, 522
59	Williford v. Williford, 150
60(b)	Town of Sylva v. Gibson, 545
60(b)(4)	Nickels v. Nickels, 690
60(b)(6)	Whitfield v. Wakefield, 124

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

V Amendment	State v. Griffin, 564
-------------	-----------------------

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.

9(b)(5)	State v. Washington, 458
28(a)	Noell v. Winston, 455

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
Allison v. Allison	51 N.C. App. 622	Denied, 303 N.C. 543 Appeal Dismissed
American Clipper Corp. v. Howerton	51 N.C. App. 539	Allowed, 303 N.C. 710
Bone International, Inc. v. Brooks	51 N.C. App. 183	Allowed, 303 N.C. 180
Brown's Cabinets v. Mfg. Enterprises	51 N.C. App. 248	Denied, 303 N.C. 180
Bryant v. Lowery	51 N.C. App. 710	Denied, 303 N.C. 314
Burrow v. Jones	51 N.C. App. 549	Denied, 303 N.C. 314
Carolina-Atlantic Distributors v. Teachey's Insulation	51 N.C. App. 705	Denied, 303 N.C. 710
Financial Corp. v. Harnett Transfer	51 N.C. App. 1	Denied, 302 N.C. 629
Fungaroli v. Fungaroli	51 N.C. App. 363	Denied, 303 N.C. 314
Gilliam v. Holden	51 N.C. App. 464	Denied, 303 N.C. 543
Harris v. Harris	51 N.C. App. 103	Denied, 303 N.C. 180
Hill v. Smith	51 N.C. App. 670	Denied, 303 N.C. 543
In re Leakan	51 N.C. App. 464	Denied, 303 N.C. 181
In re Plushbottom and Peabody	51 N.C. App. 285	Denied, 303 N.C. 314
In re Wake Forest University	51 N.C. App. 516	Denied, 303 N.C. 544
In re Wake Forest University	51 N.C. App. 516	Denied, 304 N.C. 195
Insurance Co. v. Allison	51 N.C. App. 654	Denied, 303 N.C. 315
Johnson v. Johnson	51 N.C. App. 710	Denied, 303 N.C. 544
McGee v. Insurance Co.	51 N.C. App. 72	Denied, 303 N.C. 181
Nickels v. Nickels	51 N.C. App. 690	Denied, 303 N.C. 545
Noell v. Winston	51 N.C. App. 455	Denied, 303 N.C. 315
N.C. Grange Ins. Co. v. Johnson	51 N.C. App. 447	Allowed, 303 N.C. 315
Pallet Co. v. Wood	51 N.C. App. 702	Denied, 303 N.C. 545
Potter v. Potter	51 N.C. App. 464	Denied, 303 N.C. 315
Reynolds v. Reynolds	51 N.C. App. 711	Denied, 303 N.C. 545
Rollins v. Rollins	51 N.C. App. 249	Denied, 303 N.C. 181
Sermons v. Peters, Comr. of Motor Vehicles	51 N.C. App. 147	Denied, 302 N.C. 630

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
Smith v. American & Efird Mills	51 N.C. App. 480	Denied, 304 N.C. 197
Smith v. American & Efird Mills	51 N.C. App. 480	Allowed, 304 N.C. 589 Appeal Dismissal Rescinded
Stanley v. Stanley	51 N.C. App. 172	Denied, 303 N.C. 182
State v. Allen	51 N.C. App. 247	Denied, 302 N.C. 630
State v. Alston	44 N.C. App. 72	Denied, 304 N.C. 589
State v. Arthur	51 N.C. App. 464	Denied, 303 N.C. 315
State v. Berry	51 N.C. App. 97	Denied, 303 N.C. 182 Appeal Dismissed
State v. Black	51 N.C. App. 687	Denied, 303 N.C. 546
State v. Brooks	51 N.C. App. 90	Denied, 302 N.C. 630
State v. Campbell	51 N.C. App. 710	Denied, 303 N.C. 546
State v. Cherry	51 N.C. App. 118	Allowed, 302 N.C. 631
State v. Clontz	51 N.C. App. 639	Allowed, 303 N.C. 711
State v. Coasey	51 N.C. App. 450	Denied, 303 N.C. 546
State v. Dickerson	51 N.C. App. 710	Denied, 303, N.C. 547
State v. Dizor	51 N.C. App. 247	Denied, 302 N.C. 631
State v. Duncan	51 N.C. App. 710	Denied, 303 N.C. 316
State v. Easter	51 N.C. App. 190	Denied, 303 N.C. 183
State v. Fennell	51 N.C. App. 460	Denied, 303 N.C. 316
State v. Gaten	28 N.C. App. 273	Denied, 304 N.C. 392
State v. Hooper	51 N.C. App. 711	Denied, 304 N.C. 199
State v. Johnson	51 N.C. App. 248	Denied, 303 N.C. 183
State v. Lednum	51 N.C. App. 387	Denied, 303 N.C. 317
State v. Long	51 N.C. App. 248	Denied, 302 N.C. 400
State v. Parker	51 N.C. App. 711	Denied, 303 N.C. 318 Appeal Dismissed
State v. Reams	51 N.C. App. 24	Denied, 303 N.C. 183 Appeal Dismissed
State v. Roberts	51 N.C. App. 221	Denied, 303 N.C. 318
State v. Shaw	51 N.C. App. 248	Denied, 302 N.C. 401
State v. Shaw	51 N.C. App. 248	Denied, 302 N.C. 401
State v. Snowden	51 N.C. App. 511	Denied, 303 N.C. 318
State v. Southern	51 N.C. App. 711	Denied, 303 N.C. 183
State v. Taylor	51 N.C. App. 248	Denied, 302 N.C. 633
State v. Vaughan	51 N.C. App. 408	Denied, 303 N.C. 319
State v. Williams	51 N.C. App. 397	Denied, 303 N.C. 319
Sugg. v. Parrish	51 N.C. App. 630	Denied, 303 N.C. 550
Town of Sylva v. Gibson	51 N.C. App. 545	Denied, 303 N.C. 319 Appeal Dismissed

<i>Case</i>	<i>Reported</i>	<i>Disposition Supreme Court</i>
Trucking Co. v. Phillips	51 N.C. App. 85	Denied, 303 N.C. 320
Trucking Co. v. Phillips	51 N.C. App. 85	Denied, 303 N.C. 550
Walters v. Tire Sales & Service	51 N.C. App. 378	Denied, 303 N.C. 320
Whitfield v. Wakefield	51 N.C. App. 124	Denied, 303 N.C. 184
Yates Motor Co. v. Simmons	51 N.C. App. 339	Denied, 303 N.C. 320

CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

PACCAR FINANCIAL CORP. v. HARNETT TRANSFER, INC., DONELL
GORDON GARRIS AND HARD TIMES TRANSFER, INC.

No. 8011SC613

(Filed 3 March 1981)

1. Rules of Civil Procedure § 50— motion for directed verdict after mistrial

Where the trial court initially granted plaintiff's motion for directed verdict on the issue of right to possession of collateral given to secure a loan, the initial grant of the motion was withdrawn when the court subsequently submitted the issue to the jury, the jury followed the court's peremptory instruction to find in favor of plaintiff on the issue of possession but was unable to agree on all other issues submitted, and the trial court declared a mistrial, plaintiff's motion after the mistrial was declared for judgment in accordance with its motion for a directed verdict on its right to possession of the collateral was proper, since the motion was made when a motion for directed verdict had been denied and there was no verdict with final effect. G.S. 1A-1, Rule 50(b)(1).

2. Rules of Civil Procedure § 50.2—directed verdict for party with burden of proof

A directed verdict for the party with the burden of proof is not improper where his right to recover does not depend on the credibility of his witnesses and the pleadings, evidence, and stipulations show that there is no issue of genuine fact for jury consideration.

3. Mechanics' Liens § 2; Uniform Commercial Code § 45— collateral for loan – sale under mechanics' lien – purchaser's satisfaction of account for repairs – lender's security interest not extinguished

Where the purchaser of personal property which is subject to a valid, enforceable, perfected security interest buys in the collateral at a foreclosure sale conducted pursuant to G.S. 44A-1 *et seq.* to satisfy an account for

Financial Corp. v. Harnett Transfer

repairs which the purchaser has failed to pay for a purchase price which essentially represents payment of the account, the purchaser does not thereby extinguish the security interest. Rather, the security property or collateral remains subject to the security interest, and if the indebtedness for payment of which the collateral was pledged remains in default, the right to possession continues to be with the holder of the security interest. G.S. 25-9-503; G.S. 44A-2(d); G.S. 44A-6.

APPEAL by defendant Hard Times Transfer, Inc., from *Mills, Judge*. Judgment entered 25 January 1980 in Superior Court, HARNETT County. Heard in the Court of Appeals 14 January 1981.

Plaintiff filed a complaint on 16 January 1978 against defendants Harnett Transfer, Incorporated (hereinafter "Harnett Transfer") and Donell Gordon Garris (hereinafter "Garris") alleging the following: Garris executed a note agreeing to pay the sum of \$21,000 to plaintiff's assignor, Peterbilt Southern, Incorporated. The indebtedness was secured by a security agreement which granted plaintiff's assignor a security interest in collateral described as a 1974 Kenworth (hereinafter "truck"). The instruments attached as exhibits to the complaint provided that failure to make timely payments on the note constituted a default, and that in the event of default plaintiff's assignor (and thus plaintiff by assignment) had the right to possess and sell the collateral. Garris had entered an agreement with Harnett Transfer for sale of the truck, and possession thereof had been delivered to Harnett Transfer, which had assumed responsibility for the payments. The note was in default, and plaintiff had demanded immediate payment of the balance, namely, \$14,112.42 plus interest from 31 December 1977. Plaintiff sought judgment for the amount in default, attorney fees, claim and delivery of the collateral, foreclosure under the security agreement and sale of the collateral, and any deficiency that might remain after the sale.

Harnett Transfer answered, generally denying the allegations. It also counterclaimed for \$12,638.56 allegedly due it for repair work performed on the truck. The answer was verified by George J. Hodges (hereinafter "Hodges"), President of Harnett Transfer. Plaintiff replied to the counterclaim alleging insufficient information as to the allegations and therefore denying them.

Financial Corp. v. Harnett Transfer

Garris answered denying the material allegations of the complaint and praying that the complaint be dismissed as to him.

On 5 October 1978 plaintiff obtained an order allowing it to amend its complaint to add Hard Times Transfer, Incorporated (hereinafter "Hard Times") as a party defendant. The amended complaint alleged that Garris had entered into a contract for sale of the truck with defendant(s) Harnett Transfer and/or Hard Times whereby possession of the truck had been transferred to defendant(s) Harnett Transfer and/or Hard Times, and that defendant(s) Harnett Transfer and/or Hard Times had assumed full obligation for payment of the indebtedness on the truck.

Hard Times answered alleging that plaintiff had not stated a claim upon which relief could be granted and generally denying plaintiff's material allegations. It also counterclaimed against plaintiff, alleging that Harnett Transfer had repaired the truck for a reasonable charge of \$12,638.56; that the charges had not been paid; that as a consequence Harnett Transfer conducted a public sale of the vehicle pursuant to its lien rights under G.S. 44A-1 *et seq.*; that it purchased the vehicle at the sale for \$12,638.56; and that it thereby became the legal owner of the vehicle, free and clear of any claim of the plaintiff. The answer was verified by Hodges, President of Hard Times. Plaintiff replied to the counterclaim alleging insufficient information as to the allegations and therefore denying them.

Prior to trial, plaintiff obtained (1) an order of seizure upon its application for claim and delivery against Garris and Harnett Transfer, and (2) a consent judgment ordering that plaintiff recover from Garris the sum of \$15,112.42 plus interest from 31 December 1977. At the close of plaintiff's evidence, plaintiff entered a stipulation of dismissal as to Harnett Transfer, and Harnett Transfer entered a stipulation of dismissal as to its counterclaim against plaintiff. The matter proceeded against Hard Times as the sole defendant.

Hard Times' motion for directed verdict at the end of plaintiff's evidence was denied. The motion was renewed at the end of all the evidence and again was denied. Plaintiff's motion at the close of all the evidence to dismiss Hard Times' counterclaim was allowed, as was its motion for directed verdict against

Financial Corp. v. Harnett Transfer

Hard Times "on the grounds that the plaintiff had shown it [was] entitled to possession of the truck and that . . . Hard Times . . . had shown nothing to defeat plaintiff's rights."

The court submitted issues to the jury and peremptorily instructed that the first issue, whether plaintiff was entitled to possession of the truck, should be answered in the affirmative. The jury followed the instruction and answered the first issue in the affirmative. It was unable to agree on two of the remaining issues, and as a consequence the court declared a mistrial.

Subsequent to the declaration of mistrial, plaintiff moved pursuant to G.S. 1A-1, Rule 50(b), for judgment in accordance with its motion for a directed verdict on its right to immediate possession of the truck. The court granted the motion and entered judgment that plaintiff was entitled to immediate possession. Defendant was ordered to deliver the truck to plaintiff immediately.

From this judgment, defendant Hard Times appeals.

Bryan, Jones and Johnson, by James M. Johnson, for plaintiff appellee.

L. Randolph Dofffermyre III, for defendant appellant Hard Times Transfer, Incorporated.

WHICHARD, Judge.

[1] The sole contention presented by defendant Hard Times is that the trial court erred in granting plaintiff's motion pursuant to G.S. 1A-1, Rule 50(b), for judgment in accordance with its motion for a directed verdict on plaintiff's right to immediate possession of the truck. Rule 50(b), in pertinent part, provides:

Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. . . . [I]f a verdict was not returned [a party who has moved for a directed verdict], within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. . . . [T]he motion shall be granted if it appears that the motion for directed verdict could properly have been granted.

Financial Corp. v. Harnett Transfer

G.S. 1A-1, Rule 50(b)(1). While the court here initially granted plaintiff's motion for directed verdict on the issue of right to possession, its subsequent submission of the issue to the jury had the effect of withdrawing the initial grant. Although the jury, pursuant to the court's peremptory instruction, answered the possession issue in favor of plaintiff, its inability to reach agreement on all other issues submitted resulted in a mistrial of the case and therefore in no verdict with final effect. Consequently, the Rule 50(b) motion was made when a motion for directed verdict had been denied and there was no verdict with final effect; and it thus was a proper motion.

[2] "A motion for directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure ... present[s] the question whether the evidence was sufficient to entitle [the party against whom the motion is made] to have a jury pass on it." *Hunt v. Montgomery Ward and Company*, 49 N.C. App. 642, 644, 272 S.E. 2d 357, 359 (1980), and cases cited. The same question is presented by a motion under Rule 50(b)(1), made "within 10 days after the jury has been discharged," for judgment in accordance with the motion for a directed verdict. G.S. 1A-1, Rule 50(b)(1); see, *Odell v. Lipscomb*, 12 N.C. App. 318, 183 S.E. 2d 299 (1971). "Normally the motion for a directed verdict is made against the party who has the burden of proof." Shuford, N.C. Civil Practice and Procedure, § 50-6 at 411 (1975). "[T]he trial judge [cannot] direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses." *Cutts v. Casey*, 278 N.C. 390, 417, 180 S.E. 2d 297, 311 (1971). A directed verdict for the party with the burden of proof, however, is not improper where his right to recover does not depend on the credibility of his witnesses and the pleadings, evidence, and stipulations show that there is no issue of genuine fact for jury consideration. *Freeman v. Development Co.*, 25 N.C. App. 56, 212 S.E. 2d 190 (1975), *Hodge v. First Atlantic Corp.*, 10 N.C. App. 632, 179 S.E. 2d 855 cert. denied 278 N.C. 701, 181 S.E. 2d 602 (1971).

Applying these principles here, we find that the pleadings and evidence established the following uncontroverted facts:

Garris purchased the truck from plaintiff's assignor, Peterbilt Southern, Incorporated, and executed a note and security agreement to Peterbilt. The truck constituted the collateral

Financial Corp. v. Harnett Transfer

described in the security agreement. Peterbilt assigned the note and security agreement to plaintiff for a valuable consideration. Thereafter Garris "lease-purchased" the truck to Hard Times in exchange for a pickup truck. The written agreement between Garris and Hard Times did not specify that Hard Times was assuming the obligation to pay the installments as they came due under the note. Garris testified, however, that he "thought [he] was out of it"; Hodges, President of Hard Times, testified, "[W]e agreed . . . to make the payments to [plaintiff] for [Garris]"; and Daniel S. Stacks, an employee of plaintiff, testified that he telephoned Hodges and Hodges told him "he was going to make the payments." Hard Times also agreed to pay for all *repairs*, maintenance, licenses, and costs of operation.

Hard Times in fact made four payments on the note. It then stopped making the payments. Hodges testified that the payments were stopped because the truck needed repairs, and Hard Times could not both make the monthly payments and pay for the repairs. Hodges and a representative of plaintiff negotiated regarding an extension of time to make the payments, but the extension was never approved. When a representative of plaintiff called Hodges to tell him the payments were past due and to threaten repossession, Hodges told him: "[Y]ou'll never get the truck back. I'll put a mechanic's lien on it for \$12,000.00 and in North Carolina a mechanic's lien is superior to your security agreement."

Harnett Transfer performed the needed repairs on the truck and charged Hard Times the sum of \$12,638.56 therefor. Hard Times did not pay the repair bill. On 27 February 1978, over a month after plaintiff filed this action against Garris and Harnett Transfer, "Harnett Transfer sold the truck at the courthouse door and Hard Times . . . purchased the same for \$12,758.56." Hard Times was subsequently joined as a party defendant in this action.

Hodges was a director, a stockholder, President and chief executive of both Harnett Transfer and Hard Times.

These facts are uncontroverted. They do not depend on the credibility of plaintiff's witnesses. The trial court thus properly granted plaintiff's motion for a directed verdict, even though plaintiff had the burden of proof, if under these uncontroverted facts plaintiff was entitled to possession of the truck as a matter

Financial Corp. v. Harnett Transfer

of law. Whether plaintiff was so entitled, then, becomes the sole issue now before us.

Article Nine, Uniform Commercial Code — Secured Transactions, contains the following provision:

Secured party's right to take possession after default. —

Unless otherwise agreed a secured party has on default the right to take the possession of the collateral.

G.S. 25-9-503. Proof of the following was required to establish that plaintiff had a valid and enforceable security interest in the truck: (1) that the debtor had signed a security agreement; (2) that the agreement contained a description of the collateral; (3) that value had been given for the agreement; and (4) that the debtor had rights in the collateral. G.S. 25-9-203. Plaintiff satisfied these requirements by introducing a signed security agreement between its assignor and Garris which described the collateral (the truck); showed that value had been given to the original creditor, its assignor; and showed that the debtor (Garris, and by virtue of the agreement with Garris, Hard Times) had rights in the collateral, namely, the right to possession and use so long as the note was not in default. Plaintiff also proved that it had given value to its assignor, the original creditor, by introducing the written assignment of the security agreement which showed that plaintiff had paid a valuable consideration for assignment of the original creditor's rights under the agreement. Plaintiff thus proved, by uncontroverted documentary evidence, its entitlement to a valid and enforceable security interest in the truck. Further, the agreement did not restrict the secured party's right to possession upon default. It thus did not fall within the "unless otherwise agreed" provision of G.S. 25-9-503. Finally, uncontroverted documentary evidence showed that the security interest had been perfected pursuant to the provisions of G.S. 25-9-302 (3)(b) and G.S. 20-58 *et seq.*

Plaintiff, then, held a valid, enforceable, perfected security interest in the truck. Hard Times therefore, upon its trade with Garris, took the truck subject to plaintiff's security interest. G.S. 25-9-301(1)(c); *see* 25-9-307 Official Comment.¹ By proving

¹"After a financing statement has been filed or after compliance with the certificate of title law *all* subsequent buyers, under the rule of subsection (2), are subject to the security interest." G.S. 25-9-307 Official Comment (1965) (emphasis supplied).

Financial Corp. v. Harnett Transfer

with uncontroverted evidence (1) that it held a valid, enforceable, perfected security interest in the truck; (2) that Hard Times took the truck under the agreement between Hard Times and Garris subject to its security interest; and (3) that a default existed in payments on the indebtedness secured, plaintiff had established its right to take possession of the truck as a matter of law. G.S. 25-9-503.

In avoidance of plaintiff's right to possession pursuant to its security interest, Hard Times has pled, offered evidence of and argued a claim of superior right to possession by virtue of its purchase of the truck upon foreclosure of the lien held by Harnett Transfer. It relies upon the following provisions of Chapter 44A of the North Carolina General Statutes:

Any person who *repairs*, services, tows or stores motor vehicles in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing or storing. *This lien shall have priority over perfected and unperfected security interests.*

G.S. 44A-2(d) (1976) (emphasis supplied); and

A purchaser for value at a properly conducted sale, and a purchaser for value without constructive notice of a defect in the sale who is not the lienor or an agent of the lienor, acquires title to the property *free of any interests over which the lienor was entitled to priority.*

G.S. 44A-6 (1976) (emphasis supplied). It asserts that Harnett Transfer, having repaired the truck which was the subject of plaintiff's security interest, was entitled to a lien which had priority, by virtue of G.S. 44A-2(d), over that security interest; and that because it was "a purchaser for value" at the foreclosure sale conducted to satisfy Harnett Transfer's lien, it acquired title "free of any interests over which the lienor [Harnett Transfer] was entitled to priority" and thus free of plaintiff's security interest, pursuant to G.S. 44A-6.

We find Hard Times' contention commendable for its creativity, but otherwise without merit. "Equity regards substance, not form, and is not bound by names parties give their transactions." *In re Will of Pendergrass*, 251 N.C. 737, 743, 112

Financial Corp. v. Harnett Transfer

S.E. 2d 562, 566 (1960); *see also*, *Erickson v. Starling*, 233 N.C. 539, 541-542, 64 S.E. 2d 832, 834 (1951). Hard Times' account for repairs with Harnett Transfer was in the sum of \$12,638.56. At Harnett Transfer's foreclosure sale Hard Times purchased the repaired property, the truck in which plaintiff had a security interest, for the sum of \$12,758.56. The purchase price at the foreclosure sale was thus \$120.00 in excess of the account for repairs. While the record is silent regarding the reason for the difference, the \$120.00 almost certainly represented the costs of the sale, perhaps combined with carrying or storage charges.

The substance of the transaction, then, is that Hard Times simply satisfied its account for repairs with Harnett Transfer. To allow Hard Times to avoid plaintiff's valid, enforceable, perfected security interest by simply satisfying its account for repairs, but doing so under the guise of a foreclosure sale pursuant to the repairing entity's statutory lien, would be to regard form over substance. Payment by Hard Times to Harnett Transfer one minute prior to the foreclosure sale clearly would not have given Hard Times title to the property free and clear of plaintiff's security interest. G.S. 44A-3 (1976).² Neither, in equity, should payment one minute later.

[3] We thus hold that when the purchaser of personal property which is subject to a valid, enforceable, perfected security interest buys in the collateral at a foreclosure sale conducted pursuant to G.S. 44A-1 *et seq.* to satisfy an account for repairs *which the purchaser has failed to pay*, for a purchase price which essentially represents payment of the account, the purchaser does not thereby extinguish the security interest. The security property or collateral remains subject to the security interest; and if the indebtedness for payment of which the collateral was pledged remains in default, the right to possession continues to be with the holder of the security interest. G.S. 25-9-503. Equity and rationality in our commercial law permit no other conclusion.

²This statute provides:

Liens conferred under this Article . . . terminate and become unenforceable when the lienor voluntarily relinquishes the possession of the property upon which a lien might be claimed, or when an owner, his agent, a legal possessor or any other person having a security or other interest in the property tenders *prior to sale* the amount secured by the lien plus reasonable storage, boarding and other expenses incurred by the lienor.

G.S. 44A-3 (1976) (emphasis supplied).

Murray v. Insurance Co.

Harnett Transfer's lien for repairs was extinguished by Hard Times' payment of its account. Upon payment of the account the right to possess the collateral reverted to Hard Times, subject to plaintiff's right as secured party to possession upon Hard Times' default in payments on the indebtedness which the collateral was pledged to secure. Default in payments by Hard Times having been established by uncontroverted evidence, the trial court correctly granted plaintiff's Rule 50(b) motion and entered judgment that plaintiff was entitled to immediate possession; and its judgment is

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

JAMES J. MURRAY AND MARY P. MURRAY v. ALLSTATE INSURANCE COMPANY

No. 8014SC657

(Filed 3 March 1981)

Damages § 12.1— punitive damages — no allegations of aggravated conduct

In an action by plaintiffs to recover under an insurance policy issued by defendants which provided coverage for damage to plaintiffs' property caused by lightning where plaintiffs alleged that defendant elected to repair the damage to their property caused by the lightning, that defendant's attempted repair of their property caused additional damage, that defendant refused to correct the improper work, and that plaintiffs were entitled to punitive damages, plaintiffs' complaint was sufficient to set out a separate tort claim for additional damage done to their property so that they were entitled to recover such actual damage as they could prove was caused by defendant's negligence, not limited to defendant's contract liability under the insurance policy, but plaintiffs did not establish a claim for punitive damages where they did not allege that defendant committed an intentional wrong against them; though the complaint made it clear that plaintiffs were proceeding on a negligence theory, they did not allege that defendant's negligence was wanton, willful, or gross; and plaintiffs' tort claim did not contain any of the elements of insult, indignity, malice, oppression, or malicious, unlawful, willful, wanton, or reckless conduct on defendant's part as would justify plaintiffs' claim for punitive damages.

APPEAL by plaintiffs from *Lee, Judge*. Order entered 20 March 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 3 February 1981.

Murray v. Insurance Co.

Plaintiffs brought this action to recover actual and punitive damages from defendant based on breach of insurance contract. In their complaint plaintiffs alleged that their property was damaged by lightning prior to July 1975 and that at that time there was in effect an insurance policy issued by defendant to plaintiffs which provided, *inter alia*, coverage for damage to the property caused by lightning. Pursuant to the policy's provisions, defendant elected to repair the damage to plaintiffs' property caused by the lightning, so as to restore it to its condition before the damage. Plaintiffs further alleged that the defendant's attempted repair of their property, performed negligently, improperly and incompletely by defendant's agent, D.W. Ward Construction Company, caused additional damage to the property. In paragraphs ten and eleven of their complaint, plaintiffs alleged respectively (a) that as a result of defendant's breach plaintiffs have sustained "extreme and grievous mental and emotional distress and suffering," and (b) that once defendant learned of the negligent repair performed by its agent, defendant, in bad faith, refused to correct the improper work and attempted, in bad faith, to persuade plaintiffs that plaintiffs' only recourse under the contract was to enter into an appraisal procedure. Based on these allegations, plaintiffs sought \$50,000.00 in punitive damages, in addition to compensatory damages.

In its answer, defendant moved to dismiss the claim for punitive damages, and moved to strike the aforementioned portions of paragraphs ten and eleven of plaintiffs' complaint relating to plaintiffs' emotional distress and defendant's bad faith, as well as plaintiffs' claim for punitive damages. The trial judge granted both motions. Although initially giving notice of appeal, plaintiffs later withdrew the appeal and moved the trial court for permission to amend their complaint. This motion was granted.

Plaintiffs amended their complaint by adding a new paragraph thirteen in which they alleged that once defendant learned of the negligent repair performed by its agent, defendant, in bad faith, refused to pay for or correct the improper work and fraudulently misrepresented plaintiffs' contractual rights to plaintiffs. Defendant's motions to strike this amendment to the complaint and to dismiss plaintiffs' claim for punitive damages were granted. Plaintiffs have appealed from this order.

Murray v. Insurance Co.

Spears, Barnes, Baker & Hoof, by Alexander H. Barnes, for plaintiff appellants.

Haywood, Denny & Miller, by George W. Miller, Jr., for defendant appellee.

WELLS, Judge.

The question presented in this appeal is whether plaintiffs have stated a cause of action upon which they can recover punitive damages. To put the question in clear perspective, we quote the pertinent paragraphs from plaintiffs' complaint as amended:

7. That in or about September 1975 the Defendant, through its agent, D.W. Ward, trading as D.W. Ward Construction Company, began work upon the repair and restoration of Plaintiffs' said property.

8. In so undertaking the work of repairing and replacing Plaintiffs' property, the Defendant owed to Plaintiffs the duty to effect such repair and restoration in a good and proper workmanlike manner, within a reasonable time, without causing further damage to Plaintiffs' said property.

9. That the Defendant, through its said agent, beginning in or about September 1975 and continuing through about May 1976, attempted to repair and restore the Plaintiffs' said property but failed to complete said repair work and failed to accomplish such repair work and restoration work in a good and proper workmanlike manner within a reasonable time but, on the contrary, performed the repair work that it did attempt in a careless, negligent and improper workmanlike manner, without completing the same, such that the Plaintiffs' said property was not properly and fully repaired, such that Defendant caused additional and further damage to Plaintiffs' said property and such that Plaintiffs' said property has been placed, at Defendant's hands, in a much worse condition than it was in before Defendant attempted to repair the same.

. . .

13. That after the Defendant Insurance Company had investigated Plaintiffs' claim that Defendant's agent had

Murray v. Insurance Co.

improperly repaired Plaintiffs' property and determined that Plaintiffs' claim was valid and after Defendant Insurance Company had determined that the only way to correct such improper work was to tear out and redo the defective work at a cost (when added to \$9,000.00 it had already paid for such improper work) of more than \$14,000.00, the Defendant Insurance Company unwarrantedly refused to pay for or correct such improper work, in bad faith, with intent to cause Plaintiffs further damage, and unfairly and fraudulently misrepresented to and attempted to convince [sic] the Plaintiffs that the Defendant Insurance Company was responsible to pay no more than its policy limit of \$14,000.00 and, on another occasion, fraudulently misrepresented to and attempted to convince the Plaintiffs that Plaintiffs had no recourse but to enter into an appraisal procedure contained in its insurance policy when it knew that such procedure was not applicable after it had elected to repair and restore Plaintiffs' property and had done such properly.

Plaintiffs contend that their complaint alleges a tort accompanying a breach of contract, sufficient to establish a claim for punitive damages. Defendant argues that the complaint rests upon an alleged breach by defendant of the terms of the contract of insurance.

Defendant did not mention or refer to G.S. 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure in its motion to dismiss. It does not appear that the trial court considered any matters outside the pleadings, and we therefore treat defendant's motion as a Rule 12(b)(6) motion. Such a motion tests the legal sufficiency of plaintiffs' claim for punitive damages. Plaintiffs' claim should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiffs could prove no set of facts in support of their claim which would entitle them to the relief sought. The rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. For purposes of ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted. *Cable, Inc. v. Finnican*, 46 N.C. App. 87, 90, 264 S.E. 2d 138, 139 (1980). G.S. 1A-1, Rule 9(b) requires, however, that circumstances constituting fraud must be stated with particularity. Using these generally accepted

Murray v. Insurance Co.

rules as to the sufficiency of pleadings, we now examine whether plaintiffs' amended complaint passes muster as to the claim for punitive damages.

The general rule is that punitive damages are not recoverable for breach of contract, except where the breach is of a contract to marry. *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E. 2d 611, 621 (1979); *Newton v. Insurance Co.*, 291 N.C. 105, 111, 229 S.E. 2d 297, 301 (1976). When the breach of contract also constitutes or is accompanied by identifiable tortious acts, the tort committed may be grounds for recovery of punitive damages. *Stanback, supra*. In order to support a claim for punitive damages, however, the identifiable tortious conduct must be accompanied by or partake of some element of aggravation. *Newton, supra*, at 112, 229 S.E. 2d at 301. While plaintiffs have sufficiently alleged that defendant's negligent acts inflicted further damage to their property, *i.e.*, a tort, the question of aggravation remains.

The right to punitive damages has been the subject of numerous decisions of our appellate courts. Because it is an aspect of the law in which human behavior impacts in various and unpredictable ways upon the feelings and sensibilities of others, it is not surprising that the cases contain an interesting collection of expressions of the public policy which underlies the right to punitive damages. In *Cotton v. Fisheries Co.*, 181 N.C. 151, 106 S.E. 487 (1921), Justice (later Chief Justice) Stacy stated the rule as follows:

Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendants' conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendants.

181 N.C. at 152, 106 S.E. at 488. See also *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). Both *Cotton* and *Baker* were actions for slander and the claims for punitive damages were rooted in malice. In *Baker*, Justice Walker expanded upon the rule in *Cotton*, stating that punitive damages "are not to be allowed

Murray v. Insurance Co.

unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury" and unless "the wrong is done willfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." 184 N.C. at 5, 113 S.E. at 572.

The basic rules enunciated in *Cotton* and *Baker* were restated in *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785 (1953), partly overruled on other grounds in *Newton v. Insurance Co.*, *supra*, a case involving defendant's fraudulent misrepresentation to plaintiffs of the size of a parcel of land sold by defendant to plaintiffs, wherein plaintiffs recovered both compensatory and punitive damages. In denying plaintiffs' entitlement to punitive damages, the Court stated:

We are inclined to the view that the facts in evidence here are not sufficient to warrant the allowance of punitive damages. There was no evidence of insult, indignity, malice, oppression or bad motive other than the same false representations for which they have received the amount demanded. Here fraud is not an accompanying element of an independent tort but the particular tort alleged.

236 N.C. at 727, 73 S.E. 2d at 788.

In *Newton*, the Court overruled *Swinton* to the extent that the rule stated in *Swinton* requires evidence of aggravation in addition to evidence of intentional wrongdoing. We do not believe the *Newton* modification of *Swinton* to be controlling here, for the reasons stated later in our opinion.

Lutz Industries, Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E. 2d 333 (1955) involved a suit to recover loss to plaintiff's building caused by fire. Plaintiff sought both compensatory and punitive damages, alleging:

"That by reason of the unlawful, wanton, wilful and gross negligent conduct of the defendant corporation and its agents and their failure to observe the rules and requirements of the National Electrical Code, and failure to observe the ordinance of the City of Lenoir, that this plaintiff is entitled to recover punitive damages of the defendant corporation in the amount of \$50,000.00."

Murray v. Insurance Co.

242 N.C. at 337, 88 S.E. 2d at 337. In denying plaintiff's claim for punitive damages, the Court stated:

In our opinion, after a careful study of the complaint, the allegations of fact therein contained are insufficient to support an award for punitive damages. This action, according to the allegations of fact in the Complaint, is to recover for damages arising from the defendants' negligent default and omission and not from any *wilful or malicious conduct* on their part.

(Emphasis supplied.) 242 N.C. at 345, 88 S.E. 2d at 342.

These general principles or rules were restated and applied by our Supreme Court in *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), a case involving a dispute over a lease of commercial real estate. Language found in the majority opinion in *Oestreicher* indicates that the Court interpreted plaintiff's evidence to show that the defendant was engaged in fraudulent and deceitful conduct, thus justifying plaintiff's claim for punitive damages. Chief Justice Sharp, in her dissent in *Oestreicher*, pointed out that by calling defendant's conduct "aggravated fraud" or referring to defendant's breach of the lease agreement as "willful", "intentional" and in "wanton disregard of the rights of plaintiff," plaintiff did not justify a claim for punitive damages, there being no evidence of insult, indignity, malice, oppression or bad motive other than those involving the breach of the lease agreement itself. 290 N.C. at 147-48, 225 S.E. 2d at 815.

Newton, supra, involved a claim for punitive damages based on defendant's "heedless, wanton, and oppressive conduct" in refusing to pay a claim for losses under the theft and burglary clauses of its insurance contract with defendant. While denying plaintiff's entitlement to punitive damages under the facts of that case, the Court included dicta in its opinion which complicates our task here. Because of its vital relevancy to this case, we quote at some length from the majority opinion in *Newton* as follows:

We need not now decide whether a bad faith refusal to pay a justifiable claim by an insurer might give rise to punitive damages. No bad faith is claimed here, nor are any facts alleged from which a finding of bad faith could be

Murray v. Insurance Co.

made. Insurer's knowledge that plaintiff was in a precarious financial position in view of his loss does not in itself show bad faith on the part of the insurer in refusing to pay the claim, or for that matter, that the refusal was unjustified. Had plaintiff claimed that after due investigation by defendant it was determined that the claim was valid and defendant nevertheless refused to pay or that defendant refused to make any investigation at all, and that defendant's refusals were in bad faith with an intent to cause further damage to plaintiff, a different question would be presented.

We are slow to impose upon an insurer liabilities beyond those called for in the insurance contract. To create exposure to such risks except for the most extreme circumstances would, we are certain, be detrimental to the consuming public whose insurance premiums would surely be increased to cover them.

On the other hand, because of the great disparity of financial resources which generally exists between insurer and insured and the fact that insurance companies, like common carriers and utilities, are regulated and clearly affected with a public interest, we recognize the wisdom of a rule which would deter refusals on the part of insurers to pay valid claims when the refusals are both unjustified and in bad faith. Punitive damages "have been allowed for a breach of duty to serve the public by a common carrier or other public utility. . . ." [Citation omitted.] Suffice it to say that we are not called upon here to adopt or reject such a rule.

291 N.C. at 115-16, 229 S.E. 2d at 303-4.

Plaintiffs argue that the foregoing language in *Newton* requires us to recognize and uphold the validity of their claim for punitive damages in this case. We do not agree. In this case, we do not reach the question posited by the Court in the above quoted portions of *Newton* for these reasons. *Newton* dealt with the question of the defendant insurance company's failure to pay a valid claim *under its contract of insurance*. Cf. *Shields v. Nationwide Mutual Fire Insurance Company*, 50 N.C. App. 355, 273 S.E. 2d 756 (1981). We do not have that question before us in this case. The reasonable inferences to be drawn from plain-

Murray v. Insurance Co.

tiffs' complaint are that (1) defendant initially responded to plaintiffs' claim by attempting to make repairs, and (2) that defendant has "tendered" its contract limits in response to plaintiffs' claim for additional damages. What we have here is defendant's refusal to acknowledge or accept liability beyond its contract limits in response to plaintiffs' claim for damages *in tort*. Plaintiffs' "bad faith" allegations speak only to defendant's refusal to accept that liability. Plaintiffs have not alleged that defendant committed an intentional wrong against them. The complaint makes it clear that plaintiffs are proceeding on a negligence theory. They have not alleged that defendant's negligence was wanton, willful, or gross. We do not see in plaintiffs' tort claim any of the elements of insult, indignity, malice, oppression, or malicious, unlawful, willful, wanton, or reckless conduct on defendant's part as would justify plaintiffs' claim for punitive damages. Neither can we agree that plaintiffs' allegations that defendant fraudulently represented that its liability to them did not extend beyond its policy limits set out a separate claim for fraud to which punitive damages might attach. Defendant was in essence asserting a defense to plaintiffs' tort claim, and we see nothing fraudulent in such conduct.

We, therefore, hold that although plaintiffs have set out a separate tort claim for additional damage done to their property, so that plaintiffs are entitled to recover such actual damage as they can prove was caused by defendant's negligence, not limited to defendant's contract liability under the insurance policy, plaintiffs have not established a claim for punitive damages.

The underlying claim for punitive damages having been properly dismissed by the trial court, the supportive allegations of the complaint were properly stricken. *Newton, supra*.

The order of the trial court is

Affirmed.

Judges ARNOLD and HILL concur.

Hawks v. Brindle

ROBERT LEE HAWKS AND WIFE, JUANITA L. HAWKS, (APPELLANTS) v.
DANIEL ARTHUR BRINDLE, AND WIFE, DEBORAH MAE BRINDLE,
(APPELLEES)

No. 8017DC569

(Filed 3 March 1981)

1. Fraud § 12.1– fraud in sale of land – insufficient evidence

Plaintiffs' evidence was insufficient for the jury in an action for fraud in the sale of land where it tended to show that defendants represented to plaintiffs that the tract of land contained 6.75 acres and that the tract actually contained only 2.85 acres which were not subject to a highway right-of-way, but plaintiffs presented no evidence that defendants had any knowledge that the size of the tract was less than 6.75 acres, that the boundaries were not what defendants indicated them to be, or that any portion of the tract was subject to the highway right-of-way.

2. Deeds § 22– covenant of seisin – highway right-of-way

The fact that 3 acres of the 6 acres of land conveyed in fee were subject to a highway right-of-way did not constitute a breach of the covenant of seisin.

3. Deeds § 24– covenant against encumbrances – highway right-of-way

Plaintiffs' evidence was sufficient to go to the jury on a claim for breach of a covenant against encumbrances where it tended to show that approximately 3 acres of a 6-acre tract conveyed by defendants to plaintiffs in fee were subject to a highway right-of-way and that neither plaintiffs nor defendants knew that the tract of land was subject to the highway right-of-way.

APPEAL by plaintiffs from *Martin (Jerry Cash)*, Judge. Judgment entered 2 April 1980 in District Court, SURRY County. Heard in the Court of Appeals 8 January 1981.

Plaintiffs bring this action for fraud, unjust enrichment, and breach of warranties arising out of their purchase from defendants of a tract of land near Dobson by general warranty deed. Plaintiffs moved for summary judgment on the breach of warranties issue on the basis of their pleadings and affidavit that tended to show the following:

In August 1978 plaintiffs purchased a tract of land containing a house trailer from defendants for \$14,000. Defendant represented to plaintiff that the tract contained 6-3/4 acres. A surveyor was retained subsequent to the sale by defendants, and the survey revealed that the tract contained only 2.85 acres that were not subject to the right-of-way for U.S. Highway 601. Plaintiffs had closed the sale before the survey because defendants needed the money at once to purchase another tract.

Hawks v. Brindle

Defendant, in showing the property to plaintiff before the sale, had pointed out a site upon which he said he had intended to build a home; but the survey had shown that the site was not even on the defendants' tract. The tract was advertised in a local newspaper as 6-3/4 acres.

Plaintiffs' interrogatories revealed that defendants paid \$6,000 for the property in 1974.

Plaintiffs' motion for summary judgment was denied, and defendants then moved for summary judgment on all issues based on their pleadings and an affidavit which tended to show the following:

Defendants had not represented to the plaintiffs that they owned 6-3/4 acres. Plaintiffs had stated that they did not care about the exact acreage but did want to know the boundary lines. Defendants had told plaintiffs that they had not had the property surveyed and did not know the exact location of the boundary lines. Defendant Arthur Brindle pointed out to plaintiff Robert Hawks the boundary lines as shown to him when he had purchased the property. Defendants did not hurry or rush the plaintiffs in completing the transaction. Plaintiffs had had an opportunity to assure themselves of the exact location of the boundary lines and the number of acres. Defendants sold the property in gross for a lump sum and not by the acre. Defendants had been asking \$17,000 for the property; plaintiffs had offered "\$14,000, no questions asked." Defendants had paid for the survey.

Defendants' motions for summary judgment were denied.

At trial plaintiffs' evidence was that defendants had given plaintiffs a deed which described 6.75 acres of land and which contained warranty clauses. There were no exceptions noted on the deed. The surveyor had found that this tract had once contained 12 acres, but had been divided roughly in half in 1949. The State had put a road and right-of-way through defendants' tract which consumed about 3 acres; the amount of land under the highway itself was about 1/4 acre. Defendant had walked the property with Hawks, pointing out the boundary lines. Brindle had stated that the tract contained 6-3/4 acres and had pointed out a site on which he and his wife had planned to build. Plaintiffs had also planned to build on that site; it was not

Hawks v. Brindle

included in the tract after the survey. Plaintiffs had wanted a survey, but had agreed to purchase the property first because defendants had an option on another piece of property which was about to run out.

Defendants' motions at the close of plaintiffs' evidence for directed verdicts on unjust enrichment and fraud were allowed; their motion for a directed verdict on breach of the covenant of seisin and the covenant against encumbrances was denied.

Defendants' evidence was that plaintiffs had looked at the land several times. Brindle had pointed out the lay of the land as it had been shown to him and had told Hawks that he had not had the land surveyed and was not sure of the exact boundary lines or of the acreage. Brindle had agreed to have the land surveyed if plaintiffs bought it. Defendants had advertised the property as containing 6-3/4 acres because they thought it contained that many acres. A third party had contacted defendants about the property and had been referred to plaintiffs. Plaintiffs had first refused to sell, then had changed their minds after the survey. They had sold the property for \$12,000.00.

Plaintiffs' motion for a directed verdict at the close of all evidence was denied. Defendants' motion for a directed verdict on breach of covenants was granted.

Richard M. Fawcett for plaintiff appellants.

Carl E. Bell for defendant appellees.

CLARK, Judge.

[1] Plaintiffs assign as error the trial court's granting of a directed verdict for defendants at the close of plaintiffs' evidence on the issue of fraud. A motion for directed verdict raises the question of whether the non-movant has produced enough evidence to go to the jury. The non-movant's evidence must be taken as true and considered in the light most favorable to him, and a directed verdict may be properly granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the non-movant. *See* W. Shuford, N.C. Civ. Prac. & Proc. § 50-5 (1975) and cases cited therein.

To overcome defendants' motion for a directed verdict then, plaintiffs had to produce some evidence of each of the essential

Hawks v. Brindle

elements of their claim. To get to the jury on the issue of fraud, the plaintiffs needed to produce evidence (1) that defendants made a definite and specific representation to them that was materially false, (2) that defendants made the representation with knowledge of its falsity, and (3) that they reasonably relied on defendants' representation. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). We have searched the record and can find nothing in plaintiffs' evidence which tends to prove that at the time of defendant Arthur Brindle's alleged representations to plaintiff Robert Hawks, Brindle had any knowledge that the acreage of the tract was less than 6-3/4 acres; that the boundaries were not what he indicated them, according to his information and belief, to be; or that any portion of the tract was subject to the highway right-of-way. "Erroneous statements made by the vendor in the sale of land as to the location of a boundary are not sufficient, standing alone, to impeach the transaction for fraud." *Tarault v. Seip*, 158 N.C. 363, 368, 74 S.E. 3, 5 (1912). Just as in the earlier case of *Gatlin v. Harrell*, 108 N.C. 485, 13 S.E. 190 (1891),

"The whole of the evidence accepted as true did not in any reasonable view of it prove the alleged fraud and deceit. The proof was that the defendants pointed out to the plaintiff certain corners and line-trees and lines of the tract so sold, and that these or some of them were not the true ones; but there is nothing to prove that the defendants knew that they were not the true ones, nor that they fraudulently intended to mislead, deceive and get advantage of the ... plaintiff."

Id. at 487-88, 13 S.E. at 191. See also *Peyton v. Griffin*, 195 N.C. 685, 687, 143 S.E. 525, 527 (1928). Plaintiffs' evidence is thus insufficient to support a verdict in their favor on the issue of fraud absent some evidence that defendant Arthur Brindle's false representations were made knowingly, and defendants' motion for directed verdict was properly granted.

Plaintiffs assign error to the denial of their motion for summary judgment on the issue of breach of covenants and to the granting of directed verdict for defendants on the same issue. Defendants conveyed the property here in question by general warranty deed, the language of which follows:

Hawks v. Brindle

“And the grantor covenants that he is seized of said premises in fee, and has the right to convey the same in fee simple; that said premises are free from encumbrances (with the exceptions above stated, if any); and that he will warrant and defend the said title to the same against the lawful claims of all persons whomsoever.”

No exceptions are noted in the deed.

Plaintiffs argue that they were entitled to recover as a matter of law for defendants breach of the covenants of seisin and against encumbrances and that defendants were not entitled to judgment as a matter of law so as to support the directed verdict in their favor.

[2] Directed verdict for defendants on the breach of covenant of seisin issue appears properly entered in light of the statements in analogous cases to the effect that “it is generally held that a deed conveying property on which there existed a right of way in the public, conveys the ultimate property in the soil, and therefore there is no breach of the covenant of seizin” *Tise v. Whitaker-Harvey Co.*, 144 N.C. 508, 515, 57 S.E. 210, 212 (1907). See also *Goodman v. Heilig*, 157 N.C. 6, 8, 72 S.E. 866, 867 (1911) (“such a right does not constitute a breach of the covenant of seizin” Citing *Kutz v. McCune*, 22 Wis. 628; Rawls on Covenants, 83, 142.) In the case *sub judice*, defendants conveyed to plaintiffs around 6 acres of land in fee. The fact that about 3 acres were subject to the highway right-of-way bears on the covenant against encumbrances rather than the covenant of seisin. By holding that directed verdict for defendants was proper on this issue, we necessarily reject plaintiffs’ arguments that they were entitled to summary judgment on this same issue.

[3] We hold that directed verdict for defendants was improperly entered on the issue of whether the highway right-of-way through the tract of land in question constituted an encumbrance sufficient to constitute breach of defendants’ covenant against encumbrances. It has been stated that “a public road and a right-of-way of a railroad are not considered encumbrances, it being presumed that a purchase of land through which a road or railway right-of-way runs was made with reference to the road or right-of-way and that the consideration was adjusted accordingly” J. Webster, Real Estate Law in North

Hawks v. Brindle

Carolina § 190 (1971); yet our Supreme Court long ago recognized that a right-of-way or easement for a public highway *may* constitute “an encumbrance or burden upon the fee” *Goodman v. Heilig*, 157 N.C. 6, 8, 72 S.E. 866, 866 (1911) (railroad right-of-way). The rule in North Carolina appears to be that a covenantee may not recover for breach of the covenant against encumbrances where the encumbrance he alleges is a public highway or railroad right-of-way and *either* (1) the covenantee purchased the property with *actual knowledge* that it was subject to the right-of-way or (2) the property was “*obviously and notoriously* subjected at the time to some right of easement or servitude” *Id.* at 8-9, 72 S.E. at 867. (Emphasis added). In short, the issue is whether the covenantee knew or should have known that the land he bought was subject to a public right-of-way. Once this issue of fact is determined in the affirmative, the covenantee is “conclusively presumed to have purchased with reference to” the right-of-way. *Id.* at 9, 72 S.E. at 867. The cases agree that this conclusive presumption exists only where the issue of the covenantee’s actual or putative knowledge (based on the notoriety of the right-of-way) is already resolved, *see id.* (“When the plaintiffs purchased the land they *knew of the existence* of the railroad and its right of way running over a portion of the land”; (emphasis added); *Tise v. Whitaker-Harvey Co.*, 144 N.C. 508, 515, 57 S.E. 210, 212 (1907) (“The parties are taken to have contracted with reference to the existence of a burden of which *they were fully aware.*” (emphasis added)); *Ex Parte Alexander*, 122 N.C. 727, 729, 30 S.E. 336, 336 (1898) (“At the date of the sale the railroad was in actual operation over the said land, with a depot station thereon, and *these facts were well known* to the purchasers.” (emphasis added)); and where the issue has not been resolved there exists a genuine issue of material fact for the jury. *Waters v. Phosphate Corp.*, 50 N.C. App. 252, 273 S.E. 2d 517 (1981).

In the case *sub judice* there is no evidence that either plaintiff or defendant knew that the tract of land was subject to the highway right-of-way. The tract as described in the deed was almost in the shape of an isosceles triangle, with the base at the south and the east side bordering on Fisher River. Plaintiffs’ evidence tended to show that defendant represented that the southeast corner of the tract was located at the intersection of the northern right-of-way line and the west edge of Fisher

Hawks v. Brindle

River, and that the tract included a desirable building site. However, it does not appear that these representations were made falsely with intent to defraud. Both parties agreed that a survey would be made after the land sale was completed. The survey revealed that the southeast corner was not located as represented but was some several hundred feet south of the north right-of-way line, which placed a substantial part of the base of the triangular-shaped tract within the right-of-way and left only 2.85 acres unencumbered by the right-of-way. It appeared there was a mutual mistake of fact as to the location of the tract. However, plaintiffs did not elect to seek a rescission based on mistake of fact; instead they brought this action to recover damages. Since a part of the tract as surveyed was located within the highway right-of-way, we conclude that the evidence was sufficient to go to the jury on plaintiffs' claim for breach of the covenant against encumbrances, and that the directed verdict on this claim was improvidently entered.

Professor Webster proposes the following rule of recovery for breach of the covenant against encumbrances:

“While there are no North Carolina cases establishing the point, if the encumbrance consists of a servitude on the land that cannot be extinguished, as in the case of an easement where the holder refuses to release it, the general view is that the diminution in value of the estate by reason of the encumbrance can be recovered; in other words, the measure of damages would be the difference between the value of the land without the encumbrance and its value as it is conveyed subject to the encumbrance.”

J. Webster, *Real Estate Law in North Carolina* § 191 (1971), *citing* Burby, *Real Property* § 127 (1965) and Cribbet, *Principles of the Law of Property* 212 (1962).

The directed verdict on plaintiffs' claim for unjust enrichment was properly allowed since this claim is based on the equitable principle of restitution, and plaintiffs have an adequate remedy at law based on the breach of the covenant against encumbrances. *See Insurance Co. v. Guilford County*, 225 N.C. 293, 34 S.E. 2d 430 (1945); *Johnson v. Stevenson*, 269 N.C. 200, 152 S.E. 2d 214 (1967); *Development Co. v. County of Wilson*, 44 N.C. App. 469, 261 S.E. 2d 275, *appeal dismissed*, 299 N.C. 735, 267 S.E. 2d 660 (1980).

State v. Moore

The order appealed from is affirmed, except for that portion which directed verdict for defendants on the issue of breach of the covenant against encumbrances, which is reversed and remanded.

Affirmed in part; Reversed and Remanded in part.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD MOORE

No. 803SC876

(Filed 3 March 1981)

1. Criminal Law § 91– speedy trial not denied

Defendant was not entitled to have his motion for a speedy trial granted where defendant was indicted on 27 August 1979; a new indictment for the same offenses was issued 7 January 1980; defendant filed a “motion for speedy trial dismissal” on 8 February 1980; defendant’s trial commenced 10 April 1980; defendant had pled not guilty at his arraignment on the 27 August 1979 indictment and had not been brought to trial for the offenses charged so that the new indictment on 7 January 1980 was issued before entry of a plea of guilty or commencement of a trial; the original indictment was therefore superseded by the subsequent indictment charging defendant with the same offenses; and thus when defendant’s dismissal motion was heard on 11 February 1980 and when his trial commenced on 10 April 1980, the 120 day limit imposed for commencement of trial by G.S. 15A-701(al)(1) had not expired.

2. Constitutional Law § 50– speedy trial – no denial of constitutional right

The trial court did not err in failing to dismiss charges against defendant for failure to grant him a speedy trial in violation of his constitutional rights, since defendant’s trial commenced 30 days from the date of his indictment; even if the time was calculated from the original indictment against defendant, only 226 days elapsed from the date of indictment to the date trial commenced; defendant neither alleged nor offered evidence tending to prove that significant periods of delay were caused by neglect or willfulness on the part of the State; defendant failed to assert his constitutional right to a speedy trial until the day before his trial commenced; and defendant failed to demonstrate prejudice resulting from the delay.

3. Criminal Law § 34– other offenses – evidence improperly admitted

The trial court erred in admitting over defendant’s objection evidence relating to his commission of other distinct, independent, or separate offenses, since the incriminating evidence against defendant consisted entirely of the testimony of three witnesses who admittedly participated with defendant in the offenses alleged; each witness testified to his extensive

State v. Moore

criminal record and admittedly testified against defendant for the purpose of minimizing his own period of incarceration; and the effect of the improperly admitted evidence was to diminish defendant's credibility with the jury.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 11 April 1980 in Superior Court, PITT County. Heard in the Court of Appeals 4 February 1981.

Defendant was convicted of felonious breaking or entering and felonious larceny. He appeals from a judgment of imprisonment.

Attorney General Edmisten, by Associate Attorney General Lisa Shepherd for the State.

Donald C. Hicks III, for defendant appellant.

WHICHARD, Judge.

[1] Defendant first contends the trial court erred in failing to dismiss the charges against him *with prejudice* for the State's failure to bring him to trial within the time limits set forth in the Speedy Trial Act, G.S. 15A-701 *et seq.* Defendant was indicted on 27 August 1979. A new indictment for the same offenses was issued 7 January 1980. He filed a "motion for speedy trial dismissal" on 8 February 1980. A hearing was held on the motion before Judge James D. Llewellyn on 11 February 1980, at which Judge Llewellyn allowed the motion *without prejudice*. A new warrant for the same offense was then issued and executed by the arrest of defendant on 11 February 1980, the same date on which his motion to dismiss for failure to comply with the Speedy Trial Act was allowed without prejudice. A new indictment for the offense was issued on 10 March 1980. Defendant's trial commenced 10 April 1980, and judgment was entered 11 April 1980.

We do not reach the question of whether Judge Llewellyn erred in failing to grant defendant's motion *with prejudice*, for we find that defendant was not entitled to have the motion granted, with or without prejudice. The initial indictment against defendant, issued on 27 August 1979, charged that the alleged offenses occurred on or about 3 November 1978. A new indictment was issued on 7 January 1980 which charged that these offenses occurred "on or about the 29th or 30th day of November, 1978." All of the evidence was to the effect that the

Stave v. Moore

offenses commenced on the night of 29 November and perhaps continued into the early morning of 30 November.

G.S. 15A-646, in pertinent part, provides:

If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge.

Defendant here had pled not guilty at his arraignment on the 27 August 1979 indictment. He had not been brought to trial for the offenses charged. Thus, the new indictment on 7 January 1980 was issued "before entry of a plea of guilty . . . or commencement of a trial." By virtue of G.S. 15A-646, then, the original indictment of 27 August 1979 was superseded by the indictment of 7 January 1980 which charged the defendant with the same offenses "charged or attempted to be charged in the first instrument." Thus, both when defendant's motion was heard on 11 February 1980 and when his trial commenced on 10 April 1980, the 120 day limit imposed for commencement of trial by G.S. 15A-701(al)(1) had not expired.¹

The State had valid reason to obtain a new indictment to allege correctly the date(s) on which the offenses charged occurred. The date(s) could have been critical to the State's capacity to prove its case if, for example, defendant had offered evidence tending to establish an alibi defense. The obtaining of a new

¹G.S. 15A-701(al)(1) provides as follows:

Notwithstanding the provisions of G.S. 15A-701(a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1980, shall begin within the time limits specified below:

- (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last

Both indictments against defendant here came within the dates set forth in this provision.

State v. Moore

indictment thus appears to have been both appropriate and in good faith. We recognize that the opportunity afforded the State by G.S. 15A-646 to obtain a new indictment which supercedes one previously issued could be exercised for the purpose of defeating the time limitations for commencement of trial imposed by the Speedy Trial Act. Concern regarding that possibility is, however, appropriately addressed to the General Assembly.

Our conclusion that defendant's motion should not have been granted in any event renders unnecessary consideration of his contention that the motion should have been granted with, rather than without, prejudice. We nevertheless offer the following observations for the guidance of bench and bar. G.S. 15A-703 provides that if a defendant is not brought to trial within the time limits imposed by G.S. 15A-701, "the charge shall be dismissed on motion of the defendant." It further provides:

In determining whether to order the charge's dismissal with or without prejudice, the Court shall consider, among other matters, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; the impact of a re-prosecution on the administration of this Article and on the administration of justice.

G.S. 15A-703 (1978). The statute thus leaves in the discretion of the trial court the determination of whether dismissal should be with or without prejudice. It *mandates*, however, that the court consider *each* of the factors set forth in making that determination. Thus, failure to establish in the record that the court has considered each of these factors, and to establish its conclusions with regard to each, may leave the reviewing court no choice but to find an abuse of discretion. In *State v. Rogers*, 49 N.C. App. 337, 341, 271 S.E. 2d 535, 538 (1980), this Court suggested "that trial courts hereafter in determining exclusionary periods under the Speedy Trial Act detail for the record findings of fact and conclusions of law" We also suggest that trial courts detail for the record findings of fact and conclusions therefrom demonstrating compliance with the mandate of G.S. 15A-703 that the factors set forth therein be considered in determining whether motions to dismiss for non-compliance

State v. Moore

with the Speedy Trial Act should be granted with or without prejudice.

[2] Defendant also contends the court erred in failing to dismiss the charges for failure to grant him a speedy trial in violation of his constitutional rights. He acknowledges in his brief that the "criteria for determining whether the right to a speedy trial has been denied and the approach to be followed were set out by the United States Supreme Court" in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972). The Court there identified four factors to be assessed: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530, 33 L.Ed 2d at 117, 92 S.Ct. at 2192. It also stated:

We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533, 33 L.Ed. 2d at 118, 92 S.Ct. at 2193.

Here, as to the length of delay, defendant's trial commenced 30 days from the date of the 10 March 1980 indictment. Even if the time is calculated from the original 27 August 1979 indictment, however, only 226 days elapsed from the date of indictment to the date trial commenced. In *State v. Hartman*, 49 N.C. App. 83, 86, 270 S.E. 2d 609, 612 (1980) this Court found that "319 days is not a sufficient time, standing alone, to constitute unreasonable or prejudicial delay." *A fortiori*, a delay of 226 days, standing alone, does not constitute unreasonable or prejudicial delay. See also *State v. Setzer*, 21 N.C. App. 511, 204 S.E. 2d 921 (1974) (13 months held not unreasonable delay).

As to the reason for the delay, "[t]he burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution." *State v. Johnson*, 275 N.C. 264, 269, 167 S.E. 2d 274, 278 (1969). Defendant here neither alleged nor offered evidence tending to prove that significant periods of delay were caused by "neglect or willfulness" on the part of the State. A portion of

State v. Moore

the delay was due to the granting of a motion for continuance filed by defendant. On one occasion defendant failed to appear due to confusion as to whether his case was on the trial calendar. We find that defendant has failed to sustain the burden of establishing that the delay in commencement of his trial was due to "neglect or willfulness" on the part of the State.

As to defendant's assertion of his right, his motion to dismiss for violation of his constitutional right to a speedy trial was filed 9 April 1980, one day before his trial commenced. His 8 February 1980 motion to dismiss related solely to the State's failure to comply with the North Carolina Speedy Trial Act. It did not assert his constitutional right to a speedy trial. The United States Supreme Court noted in *Barker* that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532, 33 L.Ed. 2d at 118, 92 S.Ct. at 2193. Defendant's failure to assert the constitutional right here until the day before his trial commenced thus makes it difficult for him to prove that he was denied a speedy trial.

As to prejudice to the defendant, while his motion asserts prejudice in the preparation of his defense in that he "cannot locate witnesses" and "cannot remember his exact whereabouts at the time of the crime," defendant offered no evidence in support of the assertion. His attorney argued to the court the same assertions set forth in the motion. There was no evidence whatsoever, though, as to who the unlocateable witnesses were or what testimony they could offer on defendant's behalf. There was no evidence tending to establish what matters defendant could have produced in his defense but for the delay of which he complains. Defendant has thus failed to demonstrate prejudice resulting from the delay. He has failed to demonstrate that his "defense will be impaired." *Barker*, 407 U.S. at 532, 33 L.Ed. 2d at 118, 92 S.Ct. at 2193.

In summary, we find no basis for concluding that defendant was denied his constitutional right to a speedy trial.

[3] Defendant finally contends the court committed prejudicial error "in allowing the introduction of evidence regarding other crimes for which the defendant was not charged and for which he was not on trial." It has long been the general rule in this jurisdiction that "in a prosecution for a particular crime,

State v. Moore

the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954). Justice Ervin set forth in *McClain* the following reasons for the rule:

(1) "Logically, the commission of an independent offense is not proof in itself of the commission of another crime." [Citations omitted.] (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose. [Citations omitted.] (3) "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." [Citations omitted.] (4) "Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial."

McClain, 240 N.C. at 173-174, 81 S.E. 2d at 365-366. See also, 1 Stansbury's North Carolina Evidence § 111 at 339-340 (Brandis revision 1973), and cases cited.

The incriminating evidence against the defendant here consisted entirely of the testimony of three "canary bird" witnesses who admittedly had participated with defendant in the offenses alleged. Each of these witnesses testified to his own extensive criminal conduct. The witness Ronald Gene Britt testified:

I basically work as a criminal. I engage in safecracking. It would be hard to say how many places I have broken into trying to find a safe. I don't know the approximate number but it would be quite a few.

State v. Moore

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... I have been convicted of other crimes

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... I am one of the most professional safecrackers in Eastern North Carolina. I don't have any idea about how many safes that I have cracked open. In all my life it would be a bunch, a whole lot.

Robert Britt testified:

I have been convicted of two breaking and entering charges in Kinston, Lenoir County. I have been convicted of receiving stolen goods and breaking and entering and larceny in Duplin County and Little Washington. . . . I have several more charges that are pending here in Pitt County and Craven County now. . . . I would suppose that I have committed in this spree of crimes, before I was caught, a hundred or so, give or take a few. . . . I know a good part of where all the crimes are or places that I have broken into. I don't know all of them. This is because there are too many to remember.

A.B. Aldridge III testified that he and the other two witnesses "used to ride all day looking places that we thought the safe was in to go in and get — peel the safe off for what we could get."

Each of these witnesses was allowed to testify, over objection, to defendant's involvement with crimes other than the one for which he was on trial. The witnesses Britt both testified that defendant was involved with them in other breaking and enterings in Rocky Mount and Kinston. The witness Aldridge also testified to defendant's involvement in a breaking and entering in Rocky Mount. The witness Robert Britt testified that defendant "may have been or may not have been" involved in still other breaking and entering offenses.

This testimony clearly violated the rule prohibiting introduction of evidence tending to show that a defendant has committed other distinct, independent or separate offenses. It did not fall within any of the "well recognized exceptions" to the rule. *See McClain*, 240 N.C. at 174-176, 81 S.E. 2d at 366. Further, defendant's credibility with the jury was the foundation of his defense. The outcome of his trial hinged entirely on whether the

Hill v. Lassiter

jury believed his testimony denying commission of the offenses or whether it believed the testimony to the contrary offered by three witnesses who admittedly possessed extensive criminal records and admittedly testified against defendant for the purpose of minimizing their own periods of incarceration. The effect of the improperly admitted evidence was to diminish defendant's credibility with the jury. In view of the extensive criminal records and the admitted motivation of the witnesses for the State, the diminution of defendant's credibility with the jury was inevitably prejudicial. Under these circumstances we find that defendant has sustained the burden of showing prejudice imposed on him by G.S. 15A-1443.

Because of the admission over defendant's objection of improper evidence relating to his commission of other distinct, independent, or separate offenses, defendant is entitled to a

New trial.

Judges WEBB and MARTIN (Harry C.) concur.

LARRY BRAXTON HILL v. MELVIN LASSITER, PRISCILLA LASSITER HILL, CAMILLE HILL MOUSER, JAY MOUSER, RUTH ELAINE HILL, CHANNING HILL (Minor), AND THE CHILDREN IN POSSE OF PRISCILLA LASSITER HILL

No. 8011SC535

(Filed 3 March 1981)

1. Judgments § 37.5— res judicata – consent judgment in divorce action

A consent judgment in a divorce action which settled "all matters of controversy regarding . . . settlement of property rights" and required plaintiff husband to apply proceeds of the sale of his farm equipment to reduce the indebtedness on the wife's farm property was *res judicata* and estopped plaintiff from bringing an action against the wife relitigating issues concerning ownership of the farm property.

2. Limitation of Actions § 4— implied contract or unjust enrichment – statute of limitations

Plaintiff's claim based on failure of defendant, his former father-in-law, to convey to him in fee as allegedly promised a tract of land on which plaintiff and his family lived and plaintiff made improvements accrued in 1965 when plaintiff had an opportunity to read a deed in which defendant conveyed the land to plaintiff's wife for life and then to her children subject to a retained

Hill v. Lassiter

life estate in defendant, since plaintiff then had notice that defendant repudiated his representations to give the land to plaintiff in fee; therefore, plaintiff's claim instituted in 1979 was barred by the statute of limitations even if the ten-year limitation of G.S. 1-56 rather than the three-year limitation of G.S. 1-52 applied. However, plaintiff's claim based on failure of defendant to convey to him his retained life estate accrued in 1977 when defendant told plaintiff he would have to get off the land and was not barred by the statute of limitations.

APPEAL by plaintiff from *Hobgood, (Robert H.) Judge*. Judgment entered as to defendant Priscilla Lassiter Hill on 27 February 1980. Judgment entered as to defendant Melvin Lassiter on 5 March 1980. Both judgments entered in Superior Court, JOHNSTON County. Heard in the Court of Appeals 6 January 1981.

Plaintiff brought this action against his wife, Priscilla Lassiter Hill, and his father-in-law, Melvin Lassiter, for fraud and deceit, quasi-contract and restitution, and rescission. He alleged that defendants led him to believe that the property on which he and his family had lived, which originally belonged to Lassiter, would be given to plaintiff and his family as their own; that he was encouraged to make improvements on the property and was led to believe that a deed had been drafted which would protect the interests of all concerned, including the plaintiff; and that the deed which was actually drafted and later recorded conveyed the property to plaintiff's wife, the defendant Priscilla Lassiter Hill, for life, remainder to her children, subject to a reserved life estate in defendant Melvin Lassiter. Plaintiff and his wife later obtained a divorce from bed and board by means of a consent judgment which included a property settlement.

Melvin Lassiter and Priscilla Lassiter Hill filed an answer denying the material allegations of the complaint, alleging that the causes of action stated in the complaint were groundless, and alleging that plaintiff's claim was barred by laches, the statute of limitations, and the statute of frauds. Defendant, Priscilla Lassiter Hill, also referred to the consent judgment in the divorce action in 1978 and raised the defenses of estoppel, *res judicata*, and accord and satisfaction. Melvin Lassiter counterclaimed for \$2,460.14 which he had paid to the Federal Land Bank on behalf of plaintiff and for \$21,261.00, which he had paid to the First National Bank of Smithfield for plaintiff. Priscilla

Hill v. Lassiter

Lassiter Hill counterclaimed for an accounting and for sums that were due her from a public sale of farm equipment conducted pursuant to the consent judgment.

Plaintiff's reply denied the allegations in defendants' counterclaims and made further allegations not relevant to this appeal. Defendants Melvin Lassiter and Priscilla Lassiter Hill filed responses to plaintiff's reply denying the allegations in the reply and moved for summary judgment. Their motion was denied.

The remaindermen, the children *in esse* and *in posse* of Priscilla Lassiter Hill, also filed answer to protect their future interest in the property, but since plaintiff was later to take a voluntary dismissal as to them so as to remove them from this lawsuit, reference throughout the remainder of this opinion to the defendants will be only to those defendants who are parties in the instant appeal, Melvin Lassiter and Priscilla Lassiter Hill. Likewise, defendants' later voluntary dismissal of their counterclaims take those out of our consideration.

Defendants moved a second time for summary judgment. Priscilla Lassiter Hill this time raised the consent judgment in the couple's prior domestic action as a bar to any relitigation of claims arising out of the same property interests purportedly settled in the consent judgment. Melvin Lassiter based his motion on the lack of any benefit accruing to him by reason of the improvements plaintiff made to the farm. Plaintiff filed an affidavit in response to defendants' motions and testified at the 25 February 1980 hearing on summary judgment to the effect that he had moved onto the farm property in 1959 soon after his marriage and at the instance of his father-in-law; that at various times, right up until the couple separated in 1977, Lassiter represented to plaintiff that he was to "[d]o what you want to, it's every bit going to be yours one day," and at another time, "If you improve it, you are going to benefit by it, because it is going to you, you all"; that Lassiter came to the farm on a Christmas not long after the couple moved out there and gave them a deed that gave the property "to her and me and the children, you see, or the ones she was going to have"; that this deed was retained for some years, but never recorded, and was finally returned to Lassiter although plaintiff could not recall whether the deed was returned at Lassiter's instance or his own; that the next

Hill v. Lassiter

deed was made in 1965 and that plaintiff read part of that deed although he later stated, "I didn't read it, I just glanced at it, how it was done, and threw it down"; that this second deed was recorded; that plaintiff first learned of Lassiter's retained life estate when he went to get a loan for improvements to the farm house in 1969; that when the couple separated in 1977, Melvin Lassiter told plaintiff, "[Y]ou will have to get off this property and so on across the road"; and that the improvements he made to the land and house were for the purpose of "looking after my family, . . . building a home."

On the foregoing evidence Judge Hobgood granted the wife's motion for summary judgment, but denied Melvin Lassiter's motion. Plaintiff appeals from summary judgment in favor of the defendant Priscilla Lassiter Hill.

Plaintiff's case came on for trial and after one day of trial, the parties stipulated that the court should hear arguments and rule on the facts already in evidence as to the applicable statute of limitations and whether plaintiff's action should be barred thereby. The court found as a fact that plaintiff received notice of Melvin Lassiter's retained life estate no later than 1969 when he was involved in securing a deed of trust loan on the property and concluded that plaintiff's action was based on an implied contract or mistake and that it was therefore barred by the three-year statute of limitations. G.S. 1-52. Plaintiff appeals from the judgment of the Court that his action be dismissed for failure to prosecute it within the applicable statutory period.

Narron and O'Hale by James W. Narron for plaintiff appellant.

Mast, Tew, Nall & Lucas by George B. Mast for defendant appellees.

CLARK, Judge.

[1] We affirm the trial court's order of summary judgment against plaintiff on his claim against Priscilla Lassiter Hill on the grounds that "the judgment in File No. 77CVD837 (Johnston County) is conclusive as to all matters in controversy between the plaintiff and Priscilla Lassiter Hill"

Hill v. Lassiter

We note that the parties' consent judgment of 24 January 1978 recites that:

"the parties have compromised and settled *all matters of controversy regarding* child support and custody, *settlement of property rights* and the [other] contested issues . . . and by consenting to this judgment authorize the Court to enter this judgment as its own judgment to be enforced by contempt or any other means set forth in the General Statutes of North Carolina or by the inherent powers of this Court." (Emphasis added).

The judgment provides for plaintiff to sell his farm equipment and apply the proceeds to pay off his wife's Buick automobile and his daughter's Vega, with the remainder of the proceeds to "be applied to the loan . . . incumbering *plaintiff's* [plaintiff in this domestic case was Priscilla Lassiter Hill] property known as 'The Pond Farm.'" (Emphasis added.)

We believe that the consent judgment is *res judicata* as to "all matters of controversy regarding . . . settlement of property rights." We view the reference to the Pond Farm and the provision for plaintiff Larry Braxton Hill [defendant in the domestic action] to pay proceeds of the sale of his farm equipment to reduce the indebtedness on "plaintiff's [the wife's] property" as establishing that both the subject matter and the issue of ownership of the property were contemplated by the parties. Plaintiff had every reason to litigate title to the farm at the time of the prior action, but did not. Rather he admitted in his pleadings that his wife was "the owner by virtue of a life estate of the home formerly occupied by the parties," and signed a consent judgment settling the property rights of the couple. That judgment was a final judgment, not subject to modification. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). We hold that plaintiff's claim against his former wife was merged into the consent judgment estopping plaintiff from re-litigating a claim arising out of the same property interests determined in the former action. *See Brondum v. Cox*, 292 N.C. 192, 232 S.E. 2d 687 (1977).

[2] We next turn to plaintiff's claim against his father-in-law, Melvin Lassiter. Defendant argues that plaintiff's claim was properly characterized by the trial judge as one for mistake or an implied contract, and asserts that the three-year statute of

Hill v. Lassiter

limitations in G.S. 1-52 was properly applied. Plaintiff argues that his claim was an action for unjust enrichment and as such should be barred only after ten years as provided in G.S. 1-56. We see no reason to be concerned either with the nature of plaintiff's action or with which of the two statutes should apply. Regardless of the tag placed on plaintiff's action, or the statute applied, it is the accrual of the action which determines when the applicable statute begins to run. We find two events significant to the accrual of plaintiff's action, and since one occurred more than ten years before the action was instituted and the other occurred within the three years next preceding its institution, the effect of these events must be the same whether the statute is ten years or three.

Our decision on this issue must be controlled by the decision of our Supreme Court in the analogous case of *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965). In that case the parties, husband and wife, placed improvements on land titled in the name of the husband alone. The husband agreed that if the wife would contribute one-half of the cost of the improvements, he would have her name added to the deed. The wife paid one-half the costs of the improvements which were completed in 1952. The wife then requested that the property be titled in the names of both her and her husband, to which the husband replied, "You don't think I'm a damn fool, do you?" The parties separated in 1959, at which time the wife brought an action to impress a resulting or constructive trust, or in the alternative, to recover her contributions to the cost of the improvements. The opinion by Justice (later Chief Justice) Sharp, discusses the inapplicability of the resulting and constructive trust doctrines, the applicability of the equitable lien doctrine, the applicability of the statute of limitations to actions between husband and wife, and the appropriate statute of limitations to be applied in that particular case; but the significance of that case to the case *sub judice* is its formulation of when such a cause of action accrues.

"Unquestionably . . . the statute of limitations began to run against plaintiff's claim against defendant when, upon completion of the house in 1952, she called upon him to perform his agreement 'to put her name on the deed' and he replied 'You don't think I'm a damn fool, do you?' This was a flat repudiation of his agreement and was notice to plaintiff that he intended to misappropriate the funds which he had

Hill v. Lassiter

received from her through their confidential relationship.”
Id. at 26, 140 S.E. 2d at 714.

Applying this analysis to the case *sub judice*, we find that plaintiff's cause of action accrued when there were sufficient repudiations by defendant Lassiter of his representations to give the land to plaintiff to put plaintiff on notice that Lassiter had no intention of ever letting plaintiff have the land. We find two events significant as repudiations and thus notice to plaintiff that Lassiter did not intend ever to give the farm to the plaintiff.

Plaintiff admits in his testimony that:

“I had read part of the deed that was recorded in 1965. I didn't read that Melvin had a life estate retained. I don't think I read that. . . .

. . . I didn't read it, I just glanced at it, how it was done, and threw it down.”

It is clear from the record that plaintiff's reference is to the deed, dated 29 January 1965 and recorded 22 November 1966, which conveyed the farm “to Priscilla Lassiter Hill for and during her natural lifetime only and then to the children of Priscilla Lassiter Hill and their heirs and assigns . . . subject to life estate in Melvin Lassiter.” We are aware that the mere registration of the deed, particularly where the plaintiff was not a party thereto, cannot of itself constitute notice to plaintiff of its contents. See *Elliott v. Goss*, 250 N.C. 185, 108 S.E. 2d 475 (1959); *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951); *Tuttle v. Tuttle*, 146 N.C. 484, 59 S.E. 1008 (1907); *Cowart v. Whitley*, 39 N.C. App. 662, 251 S.E. 2d 627 (1979). We believe, however, that plaintiff's admission that he read part of the deed suggests he had an opportunity to read all of it. He knew the deed contained property in which he expected to receive an interest. There is no indication that defendant practiced a fraud on plaintiff to prevent his reading the deed. Under circumstances where a party has every reason and opportunity to read an instrument, and can show no reason for his failure to do so, we see nothing unfair or inequitable with charging him with notice of the instrument's contents. We hold that plaintiff Larry Braxton Hill was chargeable with knowledge of the retained life estate of defend-

Hill v. Lassiter

ant Melvin Lassiter from the deed drafted in 1965 and recorded in 1966.

According to plaintiff's testimony, Lassiter said he would give the farm to plaintiff. Lassiter could give to plaintiff no more than he had. After the 1965 deed, he had nothing but a life estate and plaintiff had notice of this fact. He could still give his life estate to plaintiff, but he could no longer pass the fee. Plaintiff's action, therefore, accrued in 1965 or 1966, which is well outside even the longer ten-year statute of limitations, as to that part of Lassiter's interest in the farm that was then alienated. Regardless, then, of the statute applied, plaintiff's action against Lassiter must be limited to his father-in-law's retained life estate, since the execution, delivery, and recordation of the 1965 deed constitutes a repudiation of any earlier agreement to give the farm to plaintiff in fee, since plaintiff is chargeable with notice of the contents of the deed from the fact he admits he read part of the deed and presumably had the opportunity to read all of it, and since more than ten years passed before plaintiff instituted the present action in 1979.

Plaintiff's testimony indicates he made the improvements to the farm in the expectation that Lassiter would someday deed it to him. Although Lassiter's interest in the farm was limited to a life estate after 1965, we cannot say as a matter of law that Lassiter's conveyance of a future interest to his daughter and then to her children constituted a full repudiation of his promise to plaintiff to convey the property to him. Lassiter could still convey to plaintiff his life estate, and we think plaintiff cannot fairly be charged with notice of any intention not to do so from the 1965 deed. On the contrary, Lassiter had the ability and, so far as plaintiff knew, the intent someday to convey to plaintiff what interest he had in the farm right up until plaintiff and his wife separated in 1977. At that time plaintiff testified that Lassiter told him, "You get off," and "[Y]ou will have to get off this property and so on across the road." We believe these statements constitute a sufficient repudiation by Lassiter of his agreement to give his interest in the farm to plaintiff to constitute notice to plaintiff that Lassiter had no intention ever to make good on his promise. Thus under the rule laid down in *Fulp, supra*, plaintiff's cause of action with regard to Lassiter's retained life estate accrued in

Mazzacco v. Purcell

1977 and is barred by neither the three-year nor the ten-year statute of limitations.

The summary judgment entered 27 February 1980 in favor of Priscilla Lassiter Hill and all other defendants except defendant Melvin Lassiter is affirmed; the judgment entered 5 March 1980 barring plaintiff's action against defendant Melvin Lassiter is reversed and the cause is remanded.

Affirmed in part; Reversed in part and Remanded.

Judges HEDRICK and MARTIN (Robert M.) concur.

ROBERT MAZZACCO v. HARVEY PURCELL AND ROSEMARY PURCELL

No. 8021SC566

(Filed 3 March 1981)

Negligence § 57.11— tree cutting accident — failure to warn plaintiff of dangerous condition

In an action by plaintiff to recover for injuries sustained when he was catapulted 30 to 40 feet by a rope during a tree cutting accident, defendants were not under a duty to warn plaintiff of a dangerous situation which they created by tying one end of a rope to that portion of the tree being cut, passing the rope over the limb of a second tree, tying the other end of the rope to the trunk of a third tree, and pulling the slack in the rope, since plaintiff did not establish that the situation created by defendants was in fact dangerous, and plaintiff, who had done tree removal and pruning on a part-time basis for three or four years, knew as much or more about the situation as defendants.

Judge CLARK dissenting.

APPEAL by plaintiff from *Davis, Judge*. Judgment entered 24 January 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 January 1981.

This is a civil action wherein plaintiff seeks to recover damages for injuries sustained as a result of a tree-cutting accident which occurred on defendants' property. In paragraphs three through eight of a verified complaint filed 12 March 1979, plaintiff made the following allegations:

3. On July 2, 1977 the plaintiff was visiting the defendants at their home in Forsyth County as an invited guest.

Mazzacco v. Purcell

On said date the defendants were cutting down a tree on premises owned by them and located in Forsyth County, North Carolina and the plaintiff, at the request of the defendants, was helping the defendants cut down said tree. In the process of doing so, the plaintiff's hand was injured and the plaintiff was taken to the hospital to have it attended to.

4. The tree that the defendants were cutting down was located next to the defendants' house. To prevent it from falling on their house, the defendants tied one end of a rope to the top of the tree, placed the rope over a limb of a second tree and tied the other end of the rope to the trunk of a third tree so that the tree that was being cut down could be pulled away from the house as it fell.

5. The tree was then notched on the side away from the house so that it would fall in that direction. One of the sons of the defendants began making the back cut on the side of the tree opposite the notch and the defendant Harvey Purcell and another of the defendants' sons began pulling in the direction they wanted the tree to fall in the manner of an archer pulling on the string of his bow.

6. When the plaintiff returned from the hospital he saw the defendant Harvey Purcell and one of his sons pulling the rope laterally and the other son making the back cut. He also observed that the tree being cut was leaning toward the house and toward the son making the back cut and that the back cut was going to miss the notch thereby allowing the tree to fall in any direction including the direction of the house and the son making the back cut. This appeared to the plaintiff to be a dangerous situation so the plaintiff ran to help the defendant Harvey Purcell and his son pull on the rope and guide the tree away from the house and the son making the back cut.

7. The defendant Harvey Purcell and the son pulling on the rope were on the outside of the rope and the bow like configuration formed by pulling the rope laterally and the plaintiff was on the inside. When the tree was severed it fell and violently jerked the rope taut, throwing the plaintiff through the air like an arrow shot from a bow a distance of approximately 30 feet where the plaintiff struck another

Mazzacco v. Purcell

tree and fell to the ground causing injuries to the plaintiff as hereinafter referred to.

8. The injuries to the plaintiff were proximately caused by the negligence of the defendants in that:

A. They created a hazardous condition on their premises by using a rope in the manner described above when they either knew or should have known that said rope was not long enough to permit the tree being cut down to fall to the ground without violently jerking said rope taut and they permitted the plaintiff to place himself in a dangerous position with respect to said rope when they either knew or should have known that he was unaware of said danger.

B. They created a situation of danger to their house and to their son who was cutting said tree which caused the plaintiff to go to the aid of said house and son and they permitted the plaintiff to go to the aid of said house and son and place himself in a dangerous position when they either knew or should have known that the plaintiff was unaware of said danger.

C. They failed to warn the plaintiff of the dangerous condition of their premises as stated above when they either knew or should have known that the plaintiff was unaware of said dangerous condition.

. . .

Plaintiff further alleged that as a "proximate result of the defendants' negligence," plaintiff received injuries requiring hospitalization and medical treatment, and causing "great pain and suffering."

In their answer, defendants admitted paragraph three of the complaint, except for the allegation that defendants requested plaintiff's help, and paragraph four of the complaint, except for any allegation that defendant Rosemary Purcell was a participant. Defendants, however, denied the other paragraphs of the complaint quoted above as well as plaintiff's allegations with respect to the "proximate cause" and extent of plaintiff's injuries.

Plaintiff offered evidence at trial tending to show the following: In late June of 1977, plaintiff and his family came to

Mazzacco v. Purcell

Pfafftown, North Carolina to visit his sister and brother-in-law, the defendants. Prior to coming, plaintiff had a telephone conversation with his sister relative to plaintiff's bringing tree cutting equipment with him in order to help defendants remove some trees. Plaintiff had done tree removal and pruning on a part-time basis for approximately three to four years. Plaintiff brought the equipment with him when he came to Pfafftown, and after he arrived, had "a general discussion" with defendants with respect to removing some trees that were overshadowing defendants' recently acquired house. Several days later, a Monday, plaintiff and his sister went to the house and spent six to eight hours removing and cutting up a number of smaller trees from the front yard. They returned the next day and removed more trees.

On the following Saturday, 2 July 1977, plaintiff went to the premises with his brother-in-law, defendant Harvey Purcell, and one of Purcell's sons, Wade, to remove the trees that plaintiff and his sister had been unable to remove. The men took plaintiff's equipment, which included a chain saw and a "very, very strong" rope with them. They removed two large trees and then began working on the "most crucial" tree at the rear of the house, "a large oak tree that was leaning right over the roof of the house and blocking a lot of sunlight and actually a danger to the house." This tree "towered 60-70 feet, maybe 80 feet in the air." Plaintiff climbed into the tree using a ladder from the roof of the house, and while plaintiff was pruning some of the branches, the chain saw he was using jumped and cut his hand "fairly severely." Plaintiff went to the hospital with his wife and his sister and received five stitches on one finger. His hand was bandaged.

Upon returning "about three, maybe four hours" later, plaintiff went to the rear of the house, where he observed Harvey Purcell and Purcell's son, John, pulling on plaintiff's rope. While plaintiff was at the hospital, Harvey Purcell and his sons had continued working, and had "rigged the rope for pulling over" the oak tree. Plaintiff looked up and saw Wade on the ladder from the roof to the oak tree, about "15 feet high at least," making a cut on the upper section of the tree with the chain saw. Plaintiff noted that Wade "already cut a notch in the tree and he was proceeding to make the back cut toward the notch." It appeared to plaintiff that the "back cut" Wade was

Mazzacco v. Purcell

making might miss the notch, and based upon his experience in cutting trees, plaintiff knew that if the cut missed the notch, Wade would not be able to control the direction in which the upper section of the tree would fall and so plaintiff went over to where Harvey and John Purcell were pulling on the rope to help them pull the cut portion in the right direction when it fell.

The rope had been tied to the portion of the oak tree that was being taken down, but plaintiff was unsure how high up the rope was tied. This rope was "approximately 120 feet long." The other end of the rope was tied to another tree, but plaintiff was unaware of this when he went to help the others pull on the rope. When plaintiff came up to help Harvey and John Purcell, Harvey and John were pulling on the rope "to make it taut." Either Harvey or John then asked plaintiff, "Well, how are you going to pull with one hand?" Plaintiff then showed them how he could take the rope, and guiding it with his injured hand, pass it behind him to his other hand, in which he would hold the rope against his hip. Plaintiff, standing behind Harvey and John Purcell, began to help them pull on the rope. Harvey and John were between plaintiff and the house. The three men were "very close together, pulling" and they were "facing the tree being pulled." Harvey and John Purcell were on the "left side of the rope" while plaintiff was "on the right side of the rope." Plaintiff noticed that the portion of the rope behind him was "slack," "lying on the ground." No conversation took place between the three men at that time, except that plaintiff told the others he had received a couple of stitches and that he was all right. At one point while the men were pulling, plaintiff's wife and sister started to come over to help, but the men hollered at them to go back, which they did.

After "no longer than two minutes" from the time plaintiff began pulling on the rope, the portion of the tree being cut fell. The cut portion "came the way we were pulling it and as it fell the last thing I remember was Bill [Harvey Purcell] saying 'Turn it loose' and when the top of the tree came down the weight of that popped me." Plaintiff was "catapulted" through the air, "a distance of 30-40 feet" into a "large pine tree." Plaintiff did not remember being "catapulted" and his "next recollection" was being on the ground after striking the pine tree. The "wind had been knocked" from him. The cut portion of the tree

Mazzacco v. Purcell

“ended in a dangling position from the rope,” since the rope “was not long enough to let it get all the way to the ground.” The cut portion “was approximately 15 to 20 feet in length and a good 12 inches in diameter,” weighing “between 1500 and 2000 pounds.”

Around 29 July 1977, plaintiff returned to defendants’ home for a wedding, and went with defendant Harvey Purcell to the scene of the accident to look at other trees “that still had to be taken down.” The men talked about what happened and “how far” the rope had “catapulted” plaintiff. Purcell told plaintiff that “he was amazed that the rope hadn’t broken when this piece fell” and that “he knew that the rope was too short to allow this piece to fall clear to the ground and he thought that it might possibly break the rope and that he would have to buy [plaintiff] a new rope.”

At the close of plaintiff’s evidence, defendants moved for a directed verdict in their favor on the grounds that the evidence failed to establish any actionable negligence on the part of either defendant, and in the alternative, that the evidence showed that plaintiff was contributorily negligent as a matter of law. From a judgment granting defendants’ motion and dismissing plaintiff’s action, plaintiff appealed.

Craighill, Rendleman, Clarkson, Ingle & Blythe, by John R. Ingle, for the plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allen R. Gitter and James M. Stanley, Jr., for the defendant appellees.

HEDRICK, Judge.

From his complaint, brief, and oral argument, we understand plaintiff’s theory of his case to be that defendants were negligent when they failed to warn plaintiff of a dangerous situation which they created by tying one end of a rope to that portion of the tree being cut, passing the rope over the limb of a second tree, tying the other end of the rope to the trunk of a third tree, and pulling the slack in the rope between the second and third trees into a “bow like configuration” so that plaintiff, being on the “inside” of the rope, was propelled thirty to forty feet to his injury when the portion of the tree being cut fell and jerked the rope “taut.” Before we, or a jury, could determine whether plaintiff’s theory is even *physically* plausible, it would

Mazzacco v. Purcell

be essential to know the total length of the rope, the distances between each of the three trees, the position of the trees in relation to each other, the height of the limb on the second tree over which the rope was passed, the direction in which the rope was being pulled between the second and the third tree, the amount of slack in the rope between the second and third trees, and the direction plaintiff was propelled in relation to the three trees. While the evidence tends to show that the total length of the rope to be approximately 120 feet, the absence of any evidence as to the remaining essential facts enumerated above renders plaintiff's theory one of mere speculation and conjecture. Indeed, the only matter in the record before us which discloses the manner in which the rope was strung from the portion of the tree being cut, over the limb of a second tree and tied to the trunk of a third tree is in defendants' admission to paragraph four of the complaint. Our examination of the record discloses nothing supporting plaintiff's "bow like configuration" theory. Obviously there is evidence in the record tending to show that plaintiff was thrown through the air thirty to forty feet receiving injuries when he struck the pine tree and fell to the ground. However, negligence cannot be presumed from the mere occurrence of an injury. *Spell v. Mechanical Contractors, Inc.*, 261 N.C. 589, 135 S.E. 2d 544 (1964); *Cagle v. Robert Hall Clothes*, 9 N.C. App. 243, 175 S.E. 2d 703 (1970).

Assuming arguendo that plaintiff was an invitee on defendants' premises and that defendants therefore owed him a duty of ordinary care to maintain the premises in a safe condition and to warn of hidden dangers that have been or could be discovered by reasonable inspection, *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Sibbett v. M.C.M. Livestock, Inc.*, 37 N.C. App. 704, 247 S.E. 2d 2, *disc. rev. denied*, 295 N.C. 735, 248 S.E. 2d 864 (1978), the evidence in the record before us is insufficient to raise an inference that defendants were negligent and that such negligence was a proximate cause of plaintiff's injuries.

If the situation created by defendants during the time plaintiff was at the hospital was in fact dangerous, plaintiff, since he was the expert in the work being done, knew as much, or more, than did defendants. When plaintiff returned from the hospital, he observed that defendants' son had "notched" the tree and was cutting with plaintiff's saw toward the notch. He

Mazzacco v. Purcell

also observed that his rope, which he knew was 120 feet long, had been tied to the portion of the tree being cut and that defendant Harvey Purcell and his son were pulling on the rope to prevent the cut portion of the tree from falling toward the house. Plaintiff, aware of all these things, undertook to help pull the rope to make the tree top fall in the desired direction. The only fact of which plaintiff had no knowledge was that the end of the rope was tied to the third tree; however, there is nothing in the evidence to indicate that plaintiff could not have discovered this fact. On cross-examination, he testified: "When I picked it up I did not know that the end of the rope was wrapped around a tree. There was nothing that I know of, there was nothing that Bill [Harvey] Purcell did that would have prevented me from looking to see what it was wrapped around." In our opinion, any dangerous situation created by defendants was as obvious to plaintiff as it was to defendants. Defendants, therefore, had no duty to warn plaintiff of "hidden dangers."

The judgment appealed from is

Affirmed.

Judge MARTIN (Robert M.) concurs.

Judge CLARK dissents.

Judge CLARK, dissenting:

Considering the evidence in the light most favorable to the plaintiff, it appears that defendant knew the rope was tied to the third tree and that it was too short to permit the severed portion to fall to the ground, which would result in a sudden and forceful jerking and tightening of the rope likely to cause injury to anyone on the inside of the "bow." Knowing this, defendant and his son took a position of safety on the outside of the "bow." When plaintiff arrived at the scene while the tree was being cut, he realized defendant and his son needed help to prevent the leaning tree from falling on the house. He did not know the end of the rope was tied to the third tree, and his failure to so observe was not contributory negligence as a matter of law. He took a position on the inside of the "bow." About two minutes elapsed from the time plaintiff took that position until the tree was cut, during which time the chain saw was cut off and the ladies present were warned and directed to a position of safety. The circumstances were such that the failure of defendant to

Helms v. Prikopa

warn plaintiff of this position of danger was sufficient evidence of negligence to present the question to the jury.

In my opinion this is another close case in which the trial judge should have reserved his ruling on the motion for a directed verdict until the jury had returned a verdict and then allow or deny a Rule 50(b) motion for judgment notwithstanding the verdict.

F. BERNARD HELMS v. BARBARA A. PRIKOPA

No. 8026SC501

(Filed 3 March 1981)

Contracts § 16.1—oral loan—time of payment

A loan made on oral terms before the parties agree as to the time and manner of repayment is payable within a reasonable time rather than on demand, and the plaintiff has the burden of showing that a reasonable time for repayment has expired.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 5 March 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 January 1981.

The court entered summary judgment against defendant and ordered her to pay \$12,000.00 to plaintiff in repayment of a loan advanced on 15 November 1977.

Plaintiff presented the following evidence in his verified complaint and duly filed affidavits. In November 1977, plaintiff agreed to lend \$14,000.00 to defendant to help her purchase some real property. In return, she agreed to execute a promissory note in his favor for that amount and grant him a deed of trust on the realty to secure the note. Their oral agreement also included an understanding that the loan would bear interest and that the necessary papers would be recorded. Thereafter, plaintiff mailed a cashier's check for \$14,000.00 directly to defendant's attorney who was responsible for closing the real estate transaction. Plaintiff explained that the subsequent closing, in which defendant did not execute the note and deed of trust, violated the loan agreement:

Helms v. Prikopa

I was relying on this attorney and the real estate agent who handled the sale of the house to take care of securing the executed note and deed of trust. However, the transaction was closed without my being present and before Miss Prikopa and I reached a firm agreement as to the time and manner in which the loan should be repaid. No note and deed of trust was ever executed in my favor to secure the repayment of the Fourteen Thousand Dollars (\$14,000.00).

He then made numerous demands upon defendant to execute the agreed documents to secure repayment of the loan. Finally, on 28 December 1978, he sent defendant a formal written demand for full payment of the balance due on the loan or execution of the documents within ten days. Defendant did not comply with either request. She did, however, make two payments, of \$500.00 each, to plaintiff on 28 April and 29 October 1979. The balance due on the loan is now \$12,000.00.

In her unverified answer, defendant admitted that plaintiff had lent her the \$14,000.00; however, she denied that they had made any agreement requiring the payment of interest or any type of security.

The terms and conditions surrounding the advancement of the money by the Plaintiff to the Defendant were that no security of any type was required and that no deed of trust nor note nor interest would be required. The money would be advanced to the Defendant by the Plaintiff, allowing the Defendant to pay back the principal without limit as to amount of payment, time of payment and length of payment. That the payment of the principal was solely in the discretion of the Defendant, allowing the Defendant to pay such amounts and at such times as the Defendant was able to do so.

She stated that these oral terms were made while members of her family were present and that a note was never mentioned until March 1978. She requested the court to enter judgment upon the terms and conditions alleged by her for the principal indebtedness.

Defendant further answered that plaintiff requested a key to the house she had purchased and wanted to install a telephone there. She refused. In addition, on 5 April 1978, he sought

Helms v. Prikopa

sexual favors from her and asked her to go to bed with him. Defendant rebuffed these unsolicited advances as well.

Defendant's only response to plaintiff's motion for summary judgment consisted of an affidavit prepared by Constance Prikopa, her mother. Mrs. Prikopa testified, in pertinent part, as follows:

That on November 16, 1977, at approximately 6:26 P.M. Mr. F. Bernard Helms came to my home in Charlotte, North Carolina at which time Barbara A. Prikopa, my daughter, was present. After Mr. Helms' arrival he took out an envelope and handed the check from the envelope to my daughter, Barbara A. Prikopa, stating that he would like to make a gift of the Fourteen Thousand Dollars (\$14,000.00) however, if it were a gift, then Barbara A. Prikopa would have to pay taxes on the gift.

[A]t the time Mr. F. Bernard Helms handed the check to my daughter, Barbara A. Prikopa, in my presence no mention was made of any interest, no mention was made of a Note and no mention was made of a Deed of Trust being required. Mr. Helms stated that making people happy was all the thanks that he wanted and he enjoyed making people happy.

Mrs. Prikopa also said that, after the loan was made, plaintiff assisted defendant in moving to her new residence on 17 December 1977. On this occasion, plaintiff did not mention a note, interest or deed of trust; instead, he said "he would do anything he could to help Barbara pay the loan back."

The court entered an order on 5 March 1980 in which it granted plaintiff's motion for summary judgment and ordered defendant to pay the full amount of the outstanding debt (\$12,000.00).

William H. Helms, for plaintiff appellee.

James L. Roberts, for defendant appellant.

VAUGHN, Judge.

Defendant admitted that she owed plaintiff a balance of \$12,000.00 on a loan he had advanced to her. Although the parties disputed the terms of the verbal loan agreement, the

Helms v. Prikopa

existence of the debt itself and plaintiff's right to repayment were never in issue, and the court, through summary judgment, simply ordered defendant to pay the sum due. Significantly, the court did not require defendant to pay the loan back with interest, a matter of much disagreement between the parties. Viewed in this light, the question raised by defendant's assignment of error to the entry of summary judgment is whether the court erred, as a matter of law, in its order requiring her to make full payment *presently* to plaintiff. Our inquiry must necessarily focus on the crucial disclosure in plaintiff's affidavit that the loan was made *before* the parties reached "a firm agreement as to the time and manner in which [it] should be repaid."

For the sake of clarity, however, we shall first distinguish three other types of cases that arise in the context of money lending. This is not a situation where a contract to lend money is too indefinite to be enforced because it does not specify the time for repayment or the security to be given. See *Elks v. Insurance Co.*, 159 N.C. 619, 75 S.E. 808 (1912). Obviously, since the loan has already been made, the lender cannot be left without a remedy. This is also not a case where money is payable on demand or request, with no particular time stated for payment. In that circumstance, the sum would be due immediately. See *Caldwell v. Rodman*, 50 N.C. 139 (1857). The rule is inapposite here because plaintiff did not allege that he lent the money to defendant upon the condition that she repay it on request. The third, and most common, situation involves a negotiable instrument in which no time is given for its payment. The law is well established that such an instrument would be payable on demand. G.S. 25-3-108. See *Little v. Dunlap*, 44 N.C. 40 (1852) and *Shields v. Prendergast*, 36 N.C. App. 633, 244 S.E. 2d 475 (1978) (promissory notes); *Ervin v. Brooks*, 111 N.C. 358, 16 S.E. 240 (1892), and *Freeland v. Edwards*, 3 N.C. 49 (1798) (bonds). This principle is also inapplicable for the simple reason that defendant did not execute a note for this loan, even though plaintiff said defendant had agreed to do so.

In the instant case, the substantive issue to be resolved is whether a loan made on oral terms, before the parties agree as to its time and manner of repayment, is payable on demand or within a reasonable time. Plaintiff contends that the judge correctly concluded that the balance of the loan was due on

Helms v. Prikopa

demand. He relies on the general rule that when the contract fixes no time for payment, it is due on demand. 60 Am. Jur. 2d Payment § 6, at 615 (1972). His position is also supported by other authority which provides that a loan or a contract for the payment of money, which is silent concerning the time of payment, is payable immediately. *See generally* 54 C.J.S. Loans, at 658; 58 C.J.S., Money Lent § 3, at 878. We, however, are not persuaded by plaintiff's arguments and believe that the better view, and one which appears to be more consistent with the tenor of our own law, is that money lent pursuant to a verbal agreement, which fails to specify a time for repayment, is payable within a reasonable time. *See* 1 Williston, Contracts § 38, at 115 (3d ed. 1957) ("Money loaned under a contract must be repaid in a reasonable time if no time is fixed."). *Accord, First Nat. Bank v. Eichmeier*, 153 Iowa 154, 133 N.W. 454 (1911); *C.J. Hogan, Inc. v. Atlantic Corp.*, 332 Mass. 322, 124 N.E. 2d 905 (1955) and *McDonald v. Hanahan*, 328 Mass. 539, 105 N.E. 2d 240 (1952) [citing *Page v. Cook*, 164 Mass. 116, 41 N.E. 115 (1895)]; *Hook v. Crary*, 142 N.W. 2d 140 (N.D. 1966); *Foelkner v. Perkins*, 197 Wash. 462, 85 P. 2d 1095 (1938); *Miller v. Nudd*, 149 Wash. 419, 271 P. 80 (1928) and *Merchants Bank of Canada v. Sims*, 122 Wash. 106, 209 P. 1113 (1922).

One case in our jurisdiction which raised, although peripherally, a comparable issue is *Wade v. Lutterloh*, 196 N.C. 116, 121, 144 S.E. 694, 696 (1928). In *Wade*, the Court apparently assumed that a \$27,500.00 note, to be executed pursuant to a contract (for the purchase of capital stock) which failed to specify a time for payment of the note, would be payable within a reasonable time. The Court cited the case of *Colt v. Kimball*, 190 N.C. 169, 129 S.E. 406 (1925), which held that a reasonable time for the delivery of goods would be implied as a matter of law since the contract did not provide a definite time for it.

In this regard, the analogous case of *Commercial Security Bank v. Hodson*, 15 Utah 2d 388, 393 P. 2d 482 (1964), is also instructive. In *Hodson*, the bank sued the borrowers to collect \$32,000.00 on a promissory note, and the borrowers brought a counterclaim against the bank for breach of a contract to lend \$300,000.00. To prevail on their claim for damages, the borrowers had to show the existence of a binding enforceable contract, i.e., one which was complete in its essential terms. Their evidence tended to show that the bank had informed them their

Helms v. Prikopa

loan had been approved and that they then signed a blank note and were permitted to draw amounts up to \$32,000.00 against the loan before the bank later cancelled. The lower court entered a directed verdict in the bank's favor since there was no dispute as to the amount of money the borrowers owed. The Utah Supreme Court, however, reversed and held that the evidence was sufficient to go to the jury on the breach of a contract to lend because "[t]he fact that no exact time was fixed for the termination of this loan . . . does not render the contract void for uncertainty, but under such conditions reasonable provisions are inferable." 15 Utah 2d at 391-92, 393 P. 2d at 485 [citing *Merchants Bank of Canada v. Sims*, 122 Wash. 106, 209 P. 1113 (1922)].

We note that the inference of reasonable provisions to supply a missing term in the parties' agreement is endorsed by the Restatement (Second) of Contracts which provides:

§ 230. Supplying an Omitted Essential Term

When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

It would hardly seem reasonable, in the context of a verbal loan, where the parties have not reached an agreement as to the length of the credit period, to infer a term whereby large sums of cash are repayable upon demand as a matter of law.

We believe that *Wade v. Lutterloh* and *Colt v. Kimball*, *supra*, reflect a general tendency to infer the standard of a reasonable time for the evaluation of contractual compliance whenever the parties leave the time of payment or performance in doubt. *See also* 1 Corbin, Contracts § 96 (1963).¹ It is manifest that this standard should also apply to the loan in question when the case is analyzed according to its bare essentials.

1. The case of *Biddle v. Girard*, 11 Ariz. App. 143, 462 P. 2d 836 (1969), includes a citation to *Corbin*, *supra*, for the proposition that in straight loan situations, where no time is given, the money should be repaid within a reasonable time. We would comment that the noted author seems to favor the implication of the reasonable time standard in most situations.

Helms v. Prikopa

Plaintiff performed his promise to lend money to defendant by giving her the agreed sum. Defendant accepted the money which imposed upon her a duty to repay it. The parties, however, failed to designate a time frame for defendant's performance of her obligation to pay the money back. In such circumstances, the principle has long been established in North Carolina that "when no time is specified in a contract for the performance of an act or the doing of a thing, the law implies that it may be done or performed within a reasonable time." *Winders v. Hill*, 141 N.C. 694, 704, 54 S.E. 440, 444 (1906). See *Metals Corp. v. Weinstein*, 236 N.C. 558, 561, 73 S.E. 2d 472, 474 (1952); *Graves v. O'Connor*, 199 N.C. 231, 235, 154 S.E. 37, 39 (1930); *Michael v. Foil*, 100 N.C. 178, 191, 6 S.E. 264, 270 (1888). *Accord*, 17 Am. Jur. 2d Contracts § 329 (1964).

Our Court recently affirmed the rule, that contractual performance must be within a reasonable time when none is stated, in *Rodin v. Merritt*, 48 N.C. App. 64, 268 S.E. 2d 539 (1980). In *Rodin*, the Court further held that the determination of what constitutes a reasonable time for performance required "taking into account the purposes the parties intended to accomplish." *Id.* at 72, 268 S.E. 2d at 544. Such a determination involves a mixed question of law and fact, "[a]nd, in this State, authority is to the effect that, where this question of reasonable time is a debatable one, it must be referred to the jury for decision." *Holden v. Royall*, 169 N.C. 676, 678, 86 S.E. 583, 584 (1915); *Claus v. Lee*, 140 N.C. 552, 53 S.E. 433 (1906); *Blalock v. Clark*, 137 N.C. 140, 49 S.E. 88 (1904).

Here, plaintiff made a loan to defendant to enable her to purchase a home. Real estate loans often involve substantial sums of money which are normally paid off in monthly installments over a period of years. Plaintiff accepted two "installments" of \$500.00 each from defendant. This at least suggests that repayment of the loan was being rendered in a manner consistent with the parties' contractual intent. Thirteen months after the advancement, however, plaintiff formally demanded full payment at once. We hold that, at this point in the proceedings, the question of what was a reasonable time and manner for repayment was sufficiently "debatable" to survive plaintiff's motion for summary judgment. See *Holden v. Royall*, *supra*.

Strickland v. Equipment Development

In conclusion, we summarize our reasons for reversing the entry of summary judgment: (1) a loan is repayable within a reasonable time if no time is fixed by the parties; (2) plaintiff had the burden of showing the maturity of the loan (58 C.J.S. Money Lent § 7, at 881), *i.e.*, that a reasonable time for repayment had expired; and (3) what constitutes a "reasonable time" is a material issue of fact to be answered by the jury after due consideration of all the attendant facts and circumstances of the transaction. The judge's order entering summary judgment in plaintiff's favor is, therefore, reversed.

Reversed and Remanded.

Chief Judge MORRIS and Judge BECTON concur.

KERMITH MORRIS STRICKLAND v. DRI-SPRAY DIVISION EQUIPMENT DEVELOPMENT, A CORPORATION, AND LEAWON F. JOHNSON, D/B/A JOHNSON PAINT AND WALLPAPER AND RANSBURG CORPORATION, A CORPORATION AND SPRAYING SYSTEMS CO., INC., A CORPORATION

No. 8011SC466

(Filed 3 March 1981)

Negligence § 29.2— use of paint sprayer – absence of warnings

In an action to recover for injuries to plaintiff's hand sustained when he was struck by a discharge from an airless paint sprayer, the trial court properly entered summary judgment for defendants since plaintiff had knowledge of the risks involved in the use of the spray gun, and defendants were therefore not under a duty to warn plaintiff concerning the danger involved in spraying the spray gun at a part of his body.

APPEAL by plaintiff from *Preston, Judge*. Judgment entered 5 March 1979 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 11 November 1980.

This action arises out of an accident which occurred on 12 February 1975. Plaintiff's right hand was severely injured when struck by a discharge from an airless paint sprayer. At the time the accident occurred, plaintiff was using the paint sprayer to paint the interior of a drying kiln belonging to his employer, Smithfield Lumber Company.

Strickland v. Equipment Development

On the morning of 11 February 1975, plaintiff and his immediate superior at the lumber company, Donald Ray Allen, went to defendant, Johnson Paint and Wallpaper, and rented therefrom the airless paint sprayer which was involved in this incident. They received instruction from Keith Johnson, an employee of defendant store, in the proper methods of use of the sprayer.

The sprayer consisted of a gasoline powered combustion engine which supplied the pressure which propelled the paint from the spray gun to the surface. This engine was attached by a long hose to a nozzle type device from which the paint was emitted. The nozzle was comparable to a pistol or the spray attachment to a garden hose. The nozzle was equipped with a trigger which, when depressed, opened the nozzle and allowed the paint to be discharged at high speed.

Plaintiff began spraying the interior of the kiln, using the rented sprayer, at approximately 1:00 p.m. on the afternoon of the eleventh. Plaintiff did the actual spraying of the walls of the kiln, assisted by fellow employee, Benny Sullivan, who tended the gasoline engine and refueled the sprayer with thinned paint.

On the eleventh, plaintiff used the sprayer for approximately four hours without the occurrence of any mechanical problems. The nozzle did become clogged with paint residue some twelve times during the afternoon. When these paint build-ups occurred, plaintiff would have Sullivan stop the sprayer engine. Plaintiff would then remove the nozzle tip with a wrench and clean it with kerosene. The clogging of paint in the sprayer nozzle was a normal occurrence in paint sprayers of this sort, and it did not represent a malfunction peculiar to this particular machine. Due to the unevenness of paint mixtures, this type of clogging in paint sprayers was expected. When plaintiff and Sullivan completed their painting on the afternoon of the eleventh, they flushed and cleaned the sprayer.

At 7:30 the following morning, plaintiff resumed spraying the kiln. Over the course of the morning, the nozzle became clogged six or eight times. At around 11:00 a.m. plaintiff was on a raised walkway spraying the kiln's ceiling, when the machine's nozzle became clogged. Plaintiff descended from the walkway to clean the nozzle, carrying the sprayer in his right

Strickland v. Equipment Development

hand. He asked Sullivan to turn the engine off. The accident occurred while Sullivan was approaching the machine to do so.

When plaintiff reached the floor of the kiln from the walkway he sat down on a concrete slab. He laid the spray gun in his lap, while he lit a cigarette with his left hand. He had the tip of the sprayer nozzle cupped in the upper palm of his right hand, and the gun discharged into plaintiff's right hand causing the injury. Plaintiff was unaware of what made the gun discharge.

Following the accident, Donald Ray Allen and Sullivan completed the spraying of the kiln. They used the same paint sprayer that had injured plaintiff to finish the job. Allen experienced no malfunctions while using the sprayer other than occasional clogging.

Prior to trial both defendants made motions for summary judgment pursuant to G.S. 1A-1, Rule 56. The court considered the party's pleadings, the deposition of plaintiff, and affidavits of Benny Sullivan, Donald Ray Allen, David L. Fisher, and Jerry Grice. It found that both defendants had satisfied their burden in establishing the lack of a triable issue of material fact, and granted their motions.

On 7 February 1980, this Court allowed plaintiff's petition for writ of certiorari.

Hugh C. Talton, Jr., for plaintiff appellant.

Johnson, Patterson, Dilthey and Clay, by Ronald C. Dilthey and Paul L. Cranfill, for defendant appellee Leawon F. Johnson, d/b/a Johnson Paint and Wallpaper.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by C. Ernest Simons, Jr., for defendant appellee Spraying Systems Co., Inc.

MORRIS, Chief Judge.

Plaintiff asserts that it was error for the court to allow either motion for summary judgment. He contends that there were triable issues of fact as to whether defendants knew of prior injuries resulting from the use of this model sprayer, and whether defendants warned plaintiff of any danger in using the sprayer.

Strickland v. Equipment Development

Due to the similarity of the contentions of the parties and the applicable law, we will consider the court's action with regard to each of defendants' motions together.

Rendition of summary judgment is conditioned upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972) and cases there cited. The defendants in the instant case have fulfilled the burden of clearly establishing the lack of any triable issue of fact.

Only in exceptional negligence cases is summary judgment appropriate.

Nonetheless, summary judgment is proper in negligence actions where it appears that there can be no recovery even if the facts as claimed by plaintiff are true. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972); *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

Kiser v. Snyder, 17 N.C. App. 445, 450, 194 S.E. 2d 638, 641, *cert. denied* 283 N.C. 257, 195 S.E. 2d 689 (1973).

Plaintiff presented no evidence of hidden defects or dangers in this paint sprayer. He complained that the paint sprayer did not have adequate safeguards, and that defendants had failed to warn him of dangers involved in the use of the sprayer.

The evidence before the court tended to show that prior to the accident plaintiff was aware of the safety hazards involved in the use of such a pressurized paint sprayer. In his sworn deposition plaintiff stated:

On the morning of February 11, 1975, Mr. Allen and I went to Johnson Paint and Wallpaper. I had a general idea of what kind of equipment they would use to spray the inside of the dry kiln.

I do not know who we talked to at Johnson Paint and Wallpaper. I first saw the machine when a boy showed it to us. I recognized the machine as a paint sprayer. I had used a paint sprayer about a dozen times before this occasion. The ones I used, operated electrically and had an extension hose. The one involved in this incident operated with a

Strickland v. Equipment Development

gasoline engine and had a pipe-type device which sat down in the bucket of paint.

The paint sprayers I had previously used had a similar type nozzle or pistol grip like the one involved in this incident. In the actual spraying of the paint, the machine would be no different than the other sprayers I had used.

. . .

Q. Now, after seeing the machine and you, yourself, having operated maybe a dozen, did you have any question in your mind on the use of this machine, yourself?

A. No, sir.

Q. When you left with the machine, then I take it, you felt you had an understanding of how to use the machine?

A. Right.

. . .

During the day of February 11, I worked with the machine at least four hours that day. At no time during that day did I run into any mechanical problems with the machine itself.

. . .

Having used a spray gun on at least a dozen prior occasions and having used it on the afternoon of February 11, I knew that if I pulled the trigger on the nozzle and placed my hands in front of the nozzle, it would spray my hands with paint.

Basically, the nozzle on the end of this spray gun has the appearance of a pistol. If you pull the trigger on a pistol and you have got your hands in front of it, you are going to get shot. And the same thing is true of this spray gun.

. . .

Q. Now, when you use the gun and pull the trigger and spray, it comes out in a hissing sound, doesn't it?

A. Yes, sir.

Q. And that you knew was from pressure.

Strickland v. Equipment Development

A. Right.

Q. At any time while you used the machine, did you put your hands in front of it?

A. No, sir.

Q. Why didn't you?

A. It's not safe.

Q. You knew that before it stopped up.

A. Yes, sir.

. . .

When I first started using the machine, I noticed that it had more force than the other paint sprayers I had used. I noticed that on the 11th when I first began using it. This was a gas operated engine. At no time did anything unusual happen with respect to the operation of the machine up to the moment the accident occurred.

The issue narrows to the question of whether, under the circumstances, defendant was under a duty to warn plaintiff concerning the danger involved in spraying the spray gun at a part of his body. "When a person has knowledge of a dangerous condition, a failure to warn him of what he already knows is without significance." *Jones v. Aircraft Co.*, 253 N.C. 482, 491, 117 S.E. 2d 496, 503 (1960). See *Sellers v. Vereen*, 267 N.C. 307, 148 S.E. 2d 98 (1966); *York v. Murphy*, 264 N.C. 453, 141 S.E. 2d 867 (1965); *Spell v. Contractors*, 261 N.C. 589, 135 S.E. 2d 544 (1964); *Flores v. Caldwell*, 14 N.C. App. 144, 187 S.E. 2d 377 (1972).

We are of the opinion that the evidence here, even when considered in the light most favorable to plaintiff, establishes that plaintiff knew that if the spray gun discharged while he had his hand placed in front of its nozzle, it would cause serious injury to his hand. This would appear to be common knowledge to anyone using such a pressurized sprayer for the first time, but even more so for someone like plaintiff who admittedly had used similar spray guns on many past occasions, and who had used the very same spray gun for approximately seven hours before the accident.

Strickland v. Equipment Development

Plaintiff had knowledge of the risks involved in the use of the spray gun. Therefore, defendants' failure to warn him of such risk was insignificant.

Likewise, defendants' failure to provide any safeguards at the nozzle of the spray gun was immaterial in this instance, because the risk inherent in placing one's hand in front of the nozzle while the machine was in operation should have been obvious to any user.

For the same reasons we are of the opinion that it was not error for the court to grant summary judgment prior to the filing of answers or objections to the further interrogatories which plaintiff had submitted to defendant Spraying Systems Company, Inc. Plaintiff contends that had these interrogatories been answered, the answers would show defendant's prior knowledge of similar injuries resulting from the use of the same model sprayer. Plaintiff argues also that if the interrogatories were answered they would show whether this defendant, in light of the prior injuries resulting from the usage of that model spray gun, issued any warnings to those who might come into contact with the gun.

In support of its argument plaintiff cites *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). In that case Judge Vaughn stated:

[W]e observe that although unanswered interrogatories will not, in every case, bar the trial court from acting on motion for summary judgment [*Washington v. Cameron*, 411 F. 2d 705 (D.C. Cir. 1969)], doing so prior to the filing of objections or answers to the interrogatories in the present case was improper.

10 N.C. App. at 236, 178 S.E. 2d at 104-105.

In the instant case, even if the answers to the further interrogatories submitted by plaintiff had shown what plaintiff alleges they would, they would not have established a triable issue of fact. The interrogatories were aimed at the question of warnings, which we have already determined were not at issue in this case.

In our opinion, the evidence, when considered in the light most favorable to plaintiff, was insufficient to warrant submis-

State v. Little

sion of the case to the jury. Accordingly, the court's judgments granting both defendants' motions for summary judgment are

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. RODNEY LEPERE LITTLE

No. 8018SC770

(Filed 3 March 1981)

Rape § 18.4— assault with intent to rape – necessity for instructing on simple assault

In this prosecution for assault with intent to commit rape, the trial court erred in failing to charge the jury on the lesser included offense of simple assault where the evidence tended to show that defendant entered the victim's apartment, which was located over a public museum on a college campus, in the midafternoon; though he had a knife, he only threatened to hurt the victim and did not state any specific sexual intentions other than to tell her to get back to her bed and ask whether she wanted to get paid for it; defendant did not physically injure the victim in any way; when the victim began to scream, he dropped the knife and ran away; and defendant had been in the victim's apartment only two minutes when he left, since the evidence would permit the jury to find that, at the time he committed the assault, he did not intend to gratify his passion on the person of the victim if he encountered any significant resistance.

APPEAL by defendant from *Wood, Judge*. Judgments entered 10 April 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 January 1981.

Defendant was convicted, and active sentences were imposed, for violations of G.S. 14-54, felonious breaking or entering, and G.S. 14-22, assault with intent to commit rape.

The State's evidence, in pertinent part, tended to show the following. Gail Cotter Murphy, assistant director of admissions at Greensboro College, lived in a two-story brick house located on the edge of campus. The Brock Museum was located downstairs, and Miss Murphy resided in an apartment upstairs. A sign in the front yard, as well as a sign on the front of the building itself, identified the location of the museum for the public. There were, however, no signs on the back of the build-

State v. Little

ing, and nothing indicated that part of the building was residential.

On 21 November 1979, Miss Murphy returned home for lunch, as was her custom, at 12:30 p.m. Apparently, it was a very warm and humid day for that time of the year, and she stated that her apartment was "suffocating" when she entered. To get some relief, she opened the kitchen and bedroom windows and the back door. She then proceeded to take a shower.

As Miss Murphy was standing in the bathroom, with only a towel wrapped around her, she saw defendant standing on the roof and looking in the closed window located in the plant room of her apartment. She went back to her bedroom to get a bathrobe which she could not find. About one minute later, defendant was standing inside the plant room about six to ten feet away from her. She immediately asked him, "What do you want?" and he replied, "I guess I am in the wrong place. I am looking for the bookstore." Miss Murphy told him in a very loud aggressive voice to "Get out of here. The library is across campus." Defendant shrugged his shoulders and left through the back door.

Before Miss Murphy could recover from the initial shock of what had transpired, defendant returned (through the plant room) and approached her with a butcher knife in his right hand. She recognized the knife as one of her own which usually hung in a holder on the kitchen wall. Defendant said, "I will hurt you," and then grabbed her chest and started pulling on the towel. He also told her "Shut up; don't make a sound; take those glasses off." He grabbed her glasses with his left hand and threw them down. Miss Murphy kept moving backwards to avoid the knife which defendant kept prodding towards her throat. The knife did not, however, ever actually touch her throat. She then tried to talk to him, but he only responded, "Get back to that bed. . . . What do you want, to get paid for it? . . . Do you want to get paid for it?" Other than these inferential statements, defendant made no specific reference to sexual intercourse or his intent to rape her.

All this time, defendant was pushing her, and she kept moving backwards. Finally, both of them fell back against a love seat. Defendant was leaning directly over her on part of her leg. Using his left hand, he picked up the towel far enough to

State v. Little

see her abdomen area. At this point, Miss Murphy became hysterical and started screaming very loudly directly into his face. Defendant jumped up, dropped the knife and ran away. The entire episode, from the time defendant returned to the apartment until he left, took place in approximately two minutes.

Defendant is seventeen years old. On direct examination, he testified as follows. On 21 November 1979, he was in the vicinity of College Place where he stopped to help a man rake some leaves in the backyard of Miss Murphy's building. He received \$5.00 for this help. Earlier, when he had passed by the front of the building, he had noticed the museum sign on the front. After he finished the raking, he walked up the back steps of the building and entered an open door. He saw Miss Murphy and asked her, "Where is the Greensboro Historical Book Museum?" She told him it was on the other end of campus, and he left. He shortly returned to ask her which end of the campus the museum was on, but before he could make this inquiry, she began screaming, so he ran away. He further stated that he did not have a weapon of any kind, that he did not threaten any violence and that he did not touch Miss Murphy.

On cross-examination, defendant admitted that he had previously been convicted of two misdemeanor breaking or entering charges in 1978. He had been out of prison only seven days when the incident at Miss Murphy's occurred. Defendant, nevertheless, insisted that he thought he was going to a museum when he went up the back stairs and entered through the open door. He denied that he had been on the roof looking inside the apartment before he went in. He said he did not know it was someone's home until he saw Miss Murphy standing there with nothing on but a towel. He conceded that after she told him to leave, it was not "okay to go back in there and talk to her some more. But, yes, I did it."

Defendant made several statements to the police shortly after he was arrested. Though contradictory in some respects, these statements tended to show that defendant pushed the victim down, and that when she started screaming, he ran away. During interrogation by the officers, though, defendant never admitted that he had used a weapon.

State v. Little

The jury found defendant guilty of felonious breaking or entering and assault with intent to commit rape. With respect to the second charge, the court submitted only two possible verdicts to the jury: guilty of assault with intent to commit rape or not guilty.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

S. Kent Smith, Assistant Public Defender, for defendant appellant.

VAUGHN, Judge.

Defendant first contends that the court erred by failing to charge the jury on the lesser included offense of misdemeanor assault. We agree.

Defendant tendered a request, in apt time, for the jury to be instructed upon the offense of simple assault. Simple assault is clearly a lesser included offense of assault with intent to commit rape.¹ As a general proposition, the judge has a duty to declare and explain the law arising on all of the evidence. G.S. 15A-1232; *see State v. Leslie*, 42 N.C. App. 81, 255 S.E. 2d 635 (1979). This duty necessarily requires the judge to charge upon a lesser included offense, even absent a special request, when there is some evidence to support it. *See State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). The guiding principle is best stated in *State v. Childress*:

The general rule of practice is, that when it is permissible under the indictment, as here, to convict the defendant of "a less degree of the same crime," and there is evidence to support the milder verdict, the defendant is entitled to have the different views arising on the evidence presented to the jury under proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case,

1. Assault upon a female is also a lesser included offense of assault with intent to commit rape. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963). It would not, however, have been proper to submit this crime to the jury as a lesser included offense of assault with intent to commit rape in the case at bar since defendant was not eighteen years old. G.S. 14-33(b)(2).

State v. Little

it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge.

State v. Childress, 228 N.C. 208, 210, 45 S.E. 2d 42, 44 (1947).

The State, however, argues that all of the evidence in this case tended to establish an assault with intent to commit rape. At the outset, we note that the law is well settled that to convict a defendant of assault with intent to commit rape, the State need only prove an assault whereby defendant intended to gratify his passion on the person of the woman, at all events and notwithstanding any resistance on her part, but it is not required to show that the defendant retained this intent throughout the assault or that he made a forcible, physical attempt to have sexual intercourse with her. See *State v. Silhan*, 297 N.C. 660, 256 S.E. 2d 702 (1979); *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979); *State v. Hudson*, 280 N.C. 74, 185 S.E. 2d 189 (1971), *cert. denied*, 414 U.S. 1160, 94 S. Ct. 920 (1974); *State v. Rice*, 18 N.C. App. 575, 197 S.E. 2d 245, *cert. denied*, 283 N.C. 757, 198 S.E. 2d 727 (1973). Viewed in the light most favorable to the State, the evidence was undoubtedly sufficient to convict defendant for the higher degree crime of assault upon Miss Murphy with intent to rape. That, of course, is not the issue here. The question is whether there was *any* evidence which tended to support a conviction for the lesser offense of misdemeanor assault so that the jury should have been permitted to consider it as a possible verdict. In this regard, the State relies primarily on the case of *State v. Bradshaw*, 27 N.C. App. 485, 219 S.E. 2d 561 (1975), *review denied*, 289 N.C. 299, 222 S.E. 2d 699 (1976).

In *Bradshaw*, *supra*, the Court specifically held that the evidence, in a prosecution for assault with intent to commit rape, did not require submission of misdemeanor assault to the jury. The facts of the case were as follows. Defendant, without permission, entered the home of Martina Upchurch at 1:00 a.m. He proceeded to the living room where she was sleeping with her two children and

asked the son on the couch, "which is which?" Then he said, "Who is in this sleeping bag?" The son said, "My mother." The man said, "All right, pull your blanket over your eyes and don't look or I'll kill you." The man leaned over Martina

State v. Little

Upchurch and struck her with his fist, first on one temple and then the other. Next, he said, "You are going to die tonight." Martina Upchurch asked, "What do you want?" The man replied in explicit vernacular that he wanted to have sexual intercourse. . . . A fierce struggle ensued between Martina Upchurch and defendant. He dragged and held her continuously by her hair. During the struggle she bit him on his lower leg, and he bit her on the back. Defendant finally dragged her out into the front yard, bumping her head on the steps as she was dragged out. Martina Upchurch lost consciousness temporarily. When she regained consciousness, she was lying on her back in the front yard about twenty feet from the house, and defendant was lying on top of her. She managed to escape and run back into the house.

State v. Bradshaw, 27 N.C. App. at 486, 219 S.E. 2d at 561-62. It is thus clear that the defendant had, in fact, overcome the victim's resistance by means of a fierce struggle which left her momentarily unconscious. That act proved the necessary intent. His efforts were only frustrated by her sudden return to consciousness and quick escape. The State, therefore, presented overwhelming evidence in that case which compelled the conclusion that defendant, if he was guilty of anything at all, had assaulted the victim with intent to commit rape.

State v. Allen, 297 N.C. 429, 255 S.E. 2d 362 (1979), is a similar case where the Court held it was not error to fail to submit the lesser included offense of assault on a female. There, the defendant entered Miss Wells' trailer in the nighttime and grabbed her from behind. He said, "I'm going to f--- you right now." Miss Wells screamed, and he threatened to kill her. Nevertheless, she continued to scream and struggle with her assailant for five minutes. In the process, she received a "busted" lip and a knot on her neck. The defendant got her down on the floor and unsuccessfully tried to remove her clothing. At some point, however, he apparently became scared so he got up and ran away.

Both *Bradshaw* and *Allen*, *supra*, are distinguishable from the case at bar. In both cases, the defendants, after an

State v. Little

illegal entry into the home in the nighttime, made explicit statements to the victims concerning their intent to have sexual intercourse and threatened the women with death if they did not accede to these demands. Also, the defendants' illicit attempts were either abandoned or frustrated only after they had engaged in violent, physical struggles with their victims for at least five minutes or longer. In sum, there was no evidence whatsoever in either case that the defendants had begun these advances with the mere intent to try to gratify their lust, but desist if the women showed any resistance. In contrast, here defendant entered the apartment, which was located over a public museum on a college campus, in the midafternoon. Though he had a knife, he only threatened to hurt the woman and did not state any specific sexual intentions, other than to tell her to get back to the bed and ask whether she wanted to get paid for it. He did not physically injure her in any way. When she began to scream (after he lifted the towel), he dropped the knife and ran away. He had been in the apartment only two minutes when he left. Significantly, defendant immediately retreated from the apartment on both occasions the moment he encountered meaningful resistance, *i.e.*, as soon as Miss Murphy became verbally aggressive and loud. This evidence would permit the jury to find that, at the time defendant committed the assault, he did not intend to satisfy his lust, if he encountered any significant resistance, and thus reject the State's argument that he intended to carry out the act at all events and not withstanding any resistance he might encounter.

In *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963), the defendant, a preacher, lured the prosecutrix into a bedroom in his home on a religious pretext (to pray). Defendant's wife was home; however, she was apparently accustomed to her husband praying with church members in private. While they were praying, defendant pushed the prosecutrix down on the bed and got on top of her. He told her that she could be healed by having sexual relations with him. She responded: "No, I don't believe in no such mess as that." Nevertheless, he persisted and put his hand up her dress and tried to pull her underclothes down. She began to cry, and when his body touched hers, she told him

State v. Little

she was going to scream if he didn't leave her alone. He thereupon desisted from further sexual advances, but told her, as he unlocked the door, that she would die if she told anyone about it. Upon these facts, the Court held that the evidence was insufficient to convict the defendant of assault with intent to commit rape and ordered a new trial upon a charge of assault on a female. 260 N.C. at 756, 133 S.E. 2d at 651.

Only when the evidence of intent to commit rape at the time of the assault is overwhelming or uncontradicted should that factual issue of intent, which separates the greater offense from the lesser, be taken from the jury. The factual issue must be susceptible to clear-cut resolution. *State v. Banks*, 295 N.C. 399, 416, 245 S.E. 2d 743, 754 (1978). In *Banks*, defendant burst into the lobby of a women's restroom where the prosecutrix was reading. He pushed her against a wall and started to kiss her. When she attempted to escape, defendant, at knife point, forced her to enter a stall, disrobe, sit on the commode and prop her feet against the walls of the stall. He then rubbed his genitalia against hers and thereafter forced her to perform oral sex. The court held the evidence to be sufficient to take the case to the jury on the charge of assault with intent to commit rape but ordered a new trial because the judge failed to submit the lesser included offense of assault on a female. We conclude that the evidence of assault with intent to commit rape is much more "overwhelming" and "susceptible to clear cut resolution" in *Banks* than in the case at bar, and that the jury should have been allowed to consider the lesser offense.

New trial.

Chief Judge MORRIS and Judge BECTON concur.

McGee v. Insurance Co.

CHARLES T. McGEE v. COLONIAL LIFE & ACCIDENT INSURANCE
COMPANY

No. 8028DC716

(Filed 3 March 1981)

Insurance § 67.2— accident insurance – cause of injury – sufficiency of lay testimony

In an action to recover on a group accident insurance policy issued by defendant where plaintiff, a 53 year old meatcutter, alleged that he slipped on a wet floor at work, fell on his back, and as a result of the accidental injury became totally disabled, but where defendant alleged that plaintiff's disability, if any, was caused either directly or indirectly by long-standing infirmities of plaintiff's back, which infirmities were merely aggravated by plaintiff's fall, the trial court erred in entering summary judgment for defendant, since the medical evidence forecast by defendant in the affidavit of plaintiff's doctor was competent and persuasive, but not conclusive; the doctor's patient history, operative report, and hospital discharge summary established that plaintiff's acute symptoms began after his fall, persisted without relief after the fall, and were not relieved by disc surgery; the doctor's own evaluation of plaintiff was cautious and qualified as to the cause of his pain and disability; and plaintiff's own testimony that, prior to his fall, he had suffered from discomforting but not disabling back problems, but that after the fall the severity of his pain was sufficient to disable him was also competent for the jury to consider and weigh as to the cause of his disability.

APPEAL by plaintiff from *Roda, Judge*. Judgment entered 2 June 1980 in District Court, BUNCOMBE County. Heard in the Court of Appeals 10 February 1981.

This is an action upon a group accident insurance policy issued by defendant through plaintiff's employer. The policy provides coverage "against loss resulting directly, independently, and exclusively of all other causes from bodily injuries effected solely by accident" and specifically excludes coverage of "any loss caused directly or indirectly by disease (insect borne or otherwise) or bodily or mental infirmity, or medical or surgical treatment or diagnostic procedure therefore." Plaintiff, a 53 year old meatcutter, alleged that on 15 November 1977 while at work, he slipped on a wet floor, fell on his back, and, as a direct result of this accidental injury became totally disabled.

Defendant answered admitting plaintiff's accidental injury, but alleging that plaintiff's disability was not caused directly, independently, and exclusively by the bodily injury he received in the fall of 15 November. Defendant alleged that

McGee v. Insurance Co.

plaintiff's disability, if any, was caused either directly or indirectly by long-standing infirmities of plaintiff's back, which infirmities were merely aggravated by plaintiff's fall.

Defendant moved for summary judgment. In support of its motion, defendant offered the affidavit of plaintiff's physician, which stated:

WILLIAM J. CALLISON, being first sworn, deposes and says that he is a medical doctor, licensed to practice medicine in the State of North Carolina, specializing in orthopedic surgery; that attached hereto are copies of records from St. Joseph's Hospital, signed by me, concerning treatment given there to Charles Troy McGee; that the patient, Charles Troy McGee, sustained a fall on November 15, 1977, according to the medical history; that the patient's disability thereafter was not a result exclusively of the fall injury that he sustained on November 15, 1977, but was rather the result of the injury therefrom being superimposed upon, or an aggravation of, the patient's pre-existing back problems and degenerative disc disease; that as stated in hospital records, Mr. McGee gave a past history of back pain going back for many years; that Mr. McGee described a back injury in World War II when he was in the Navy, having slipped and fallen, striking the end of his spine, that since then the patient reported having experienced recurrent attacks of low back pain briefly requiring osteopathic manipulations; that prior to his fall on November 15, 1977, Mr. McGee had been followed as an outpatient at a Veterans Administration Hospital, receiving medications and taking hot tubs soaks at night with only minimal relief.

Defendant also offered copies of plaintiff's medical records which described in detail plaintiff's medical treatment including plaintiff's laminectomy operation performed on 22 February 1978.

In response, plaintiff offered his own affidavit, stating:

I am the Plaintiff in the above captioned cause. In December of 1943, while in the Navy and working aboard ship, I slipped and fell on the floor, landing in a sitting position and injured my tailbone, otherwise known as the

McGee v. Insurance Co.

coccyx. After experiencing intermittent problems with my tailbone area, in 1944 I received surgery to remove a cyst on my tailbone. Shortly following such surgery, I experienced no further problems or pain in my tailbone area. At the time of my tailbone injury, I had experienced no other problems with my back. I furthermore experienced no further problems with my low back until November 15, 1977.

While living in Florida, I experienced some pain in my middle back area at a place well above the L-4 level and went to an Osteopath for treatment. The manipulations which I received cured the pain and I experienced no further problems with this area of my back.

In 1976, I experienced pain and numbness in both legs. Upon seeking treatment at the VA Hospital in Asheville, North Carolina, I received medication for this problem and was told to take hot tub soaks at night, which I did. This pain and numbness in my legs at no time prevented me from working regular hours.

On November 15, 1977, at 7:30 A.M., while carrying meat at Ingles Markets, Inc. in the course of my employment as a meatcutter, I slipped on some water on the floor. My feet flew out from under me and I landed flat on my back. I immediately experienced severe pain in the lower one-half of my back, which pain later became localized to the L-4 — L-5 area. I had never experienced pain of this type in nor any problems with this particular area of my back. I was admitted to the hospital for two weeks and was treated conservatively by Dr. William J. Callison, and was later readmitted for a laminectomy at L-4 — L-5 which Dr. Callison performed. The severe pain in this area was not diminished and still persists.

Except for the problems caused by my tailbone injuries as described above, I had never before been unable to work because of any physical problems or infirmities until my accident on November 15, 1977. Since that time, I have been unable to work because of the severe pain the the L-4 — L-5 area of my back. I have been drawing disability payments from Social Security as the result of the November 15, 1977 accident, and am still unable to work.

McGee v. Insurance Co.

The trial judge granted defendant's motion for summary judgment and plaintiff has appealed.

Penland & Barden, by Talmage Penland, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and James M. Stanley, Jr., for defendant appellee.

WELLS, Judge.

The rules as to summary judgment have been previously and adequately established and explained by our appellate courts and need not be repeated here. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 469-70, 251 S.E. 2d 419, 421-22 (1979). We hold that the forecast of evidence presented by the materials before the trial court discloses a triable issue of fact and that summary judgment was improvidently entered.

The dispositive issue in this appeal is whether the medical evidence forecast by defendant in the affidavit of Dr. Callison is conclusive as to the direct, independent and exclusive cause of plaintiff's disability, or, stated in the alternative, whether plaintiff's lay testimony is competent to establish such causation. Relying on the opinion of our Supreme Court in *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965), defendant contends that plaintiff's affidavit is insufficient as a matter of law to rebut Dr. Callison's opinion as to the cause of plaintiff's disability, and that the case *sub judice* presents a situation where expert medical testimony is essential to establish causation as defined in the policy. *Gillikin* was a negligence case where plaintiff attempted to establish a blow from a car door as the cause of her injury. The opinion of the Court was posited on whether plaintiff's evidence was sufficient to show that the blow from the car door had caused a ruptured disc. We quote in pertinent part:

In this record there is not a scintilla of medical evidence that plaintiff's ruptured disc might, with reasonable probability, have resulted from the accident on June 12, 1962. "If it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness (expert) so indicates, the evidence is not sufficient to establish *prima facie* the causal relation, and if the testimony is offered by the party having the

McGee v. Insurance Co.

burden of showing the causal relation, the testimony, upon objection, should not be admitted and, if admitted, should be stricken." *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541, 545.

263 N.C. at 324, 139 S.E. 2d at 759.

In contrast to the precise situation dealt with in *Gillikin*, our appellate courts have frequently stated the rule that there are many instances in which lay testimony is competent to establish cause of injury (or death). *See, e.g., Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Tickle v. Insulating Co.*, 8 N.C. App. 5, 173 S.E. 2d 491 (1970), *cert. denied*, 276 N.C. 728 (1970); *Jordan v. Glickman*, 219 N.C. 388, 14 S.E. 2d 40 (1941) and cases cited therein. *Cf., Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980); *Soles v. Farm Equipment Co.*, 8 N.C. App. 658, 175 S.E. 2d 339 (1970). In the case *sub judice*, Dr. Callison's expert opinion testimony is clearly competent and persuasive, but it is not conclusive. Plaintiff's testimony that prior to his fall, he had suffered from discomforting but not disabling back problems, but that after the fall the severity of his pain was sufficient to disable him, is also competent for the jury to consider and weigh as to the cause of his disability. *See Soles v. Farm Equipment Co., supra*. It provides far more than a mere scintilla. It is evidence which might reasonably satisfy an impartial mind as to the sole cause of plaintiff's disability. *See 2 Stansbury's N.C. Evidence* § 210, at 152-53 (Brandis rev. 1973).

We also note with interest that in this particular fact situation, defendant's position is substantially weakened by information and statements contained in plaintiff's medical records introduced by defendant. Dr. Callison's patient history, operative report, and hospital discharge summary establish that plaintiff's acute symptoms began after his fall, persisted without relief after the fall, and were not relieved by disc surgery. Dr. Callison's own evaluation of plaintiff was cautious and qualified as to the cause of his pain and disability. His hospital discharge summary contained the following statements:

The patient had sustained a fall on 11/15/77 while working as a meat cutter in Ingle's Super Market and at that time developed accentuation of low back pain and associated rt. sciatica. He did not respond to conservative treat-

McGee v. Insurance Co.

ment at home and was subsequently admitted to St. Joseph's Hospital on 11/22/77 where he remained until 12/23/77. During this extended hospital stay he was treated with rest, traction, PT and medication without significant relief. He was seen in consultation by Dr. Alexander Maitland and Dr. Nelson Watts who failed to find any neurological or medical explanation of his persistence of severe right sciatica. Lumbar myelogram was performed at that time which showed some slight asymmetry of nerve root at L4, L5 on the right with a spinal fluid protein of 72 mgs. percent. An epidural venogram showed a complete block at L4, L5 and L5-S1 on the right. However, because of the paucity of objective physical findings, I was very reluctant to advise surgical intervention. He was seen in neurosurgical consultation by Dr. Van Blaricom who agreed there was some functional overlay to the problem. He was given an intrathecal injection of Marcaine with no significant improvement.

Accordingly, he was discharged home to continue conservative treatment at home. However, he failed to show any improvement and over the following week continued to have disabling and unrelenting right sciatica.

The patient was advised that we were at a stalemate as far as his treatment program was concerned with very little else in a positive aggressive nature to offer him other than an exploratory procedure to look at the L4, L5 nerve roots on the right. This was felt to be justified in spite of the physical findings because of his failure to respond to conservative treatment and the abnormal myelogram and epidural venogram findings with the elevated spinal fluid protein. However, a cautious prognosis was offered and the patient was advised very frankly that it was possible he could have surgery with no significant relief.

The patient was then admitted to the hospital on 2/21/78 and was taken to surgery on 2/22/78 with a hemilaminectomy being performed at L4 and L5 on the right. The only old firm annular bulges were found at L4 and L5. Both discs were opened and only a few fragments of nucleus could be removed. The L3 disc space was also explored but the disc was not opened at this level.

McGee v. Insurance Co.

Following surgery the patient's wounds healed nicely and he had an uneventful postoperative course. He remained afebrile. However, he experienced absolutely no relief of his right sciatica which persisted following surgery in a severe unrelenting manner. . . .

It would thus appear that Dr. Callison's evaluation of plaintiff when considered in relation to the cause of plaintiff's disability might be susceptible of differing inferences by a jury, and thus indicate a need for cross-examination of Dr. Callison on this point. *See Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976).

Defendant also contends that *Horn v. Insurance Co.*, 265 N.C. 157, 143 S.E. 2d 70 (1965); *Hicks v. Insurance Co.*, 29 N.C. App. 561, 225 S.E. 2d 164 (1976); and *Hooks v. Insurance Co.*, 43 N.C. App. 606, 259 S.E. 2d 567 (1979) contain the controlling rules of law as to accident insurance policies similar to the policy in the case *sub judice*, and require our affirmance of the judgment below. We cannot agree. *Horn* is distinguishable on the facts, as clearly indicated in the Court's opinion. We quote the dispositive portion.

Plaintiff, in § 14 of his complaint, alleged insured suffered shock, blows and injuries which "caused his heart to stop beating and caused his death." The evidence supports the allegation that the immediate cause of death was the failure of the heart to perform its normal function. The evidence is sufficient to support a finding that the shock of excitement created by running off the road and striking the tree caused a strain on the heart and blood vessels, which they, *because of the diseased condition*, could not stand. This is as far as the evidence will warrant a factual finding. . . .

(Emphasis supplied.) 265 N.C. at 164, 143 S.E. 2d at 75-76. In *Horn*, there was no evidence that the accident could have been the sole cause of death.

Hicks is also not in point. In that case this Court held that plaintiff's evidence in opposition to defendant's motion for summary judgment raised only the inference that the decedent's fall *contributed* to the cause of death. In the case *sub judice*, plaintiff's evidence supports an inference that the fall was the *sole* cause of his disability.

State v. Pace

Hooks is not in point because in that case, this Court found that "all the evidence is to the effect that the . . . accident was not the sole cause of plaintiff's disability." (Emphasis supplied.) 43 N.C. App. at 611, 259 S.E. 2d at 570.

We also note that plaintiff's position in the case *sub judice* is supported by the opinion of this Court in *Emanuel v. Insurance Co.*, 35 N.C. App. 435, 242 S.E. 2d 381 (1978), to the effect that a question of fact exists in this case as to whether plaintiff's previous back problems were so severe as to be classified as a "disease" within the meaning of the policy. *Id.*, at 442, 242 S.E. 2d at 385. Following the reasoning of *Emanuel*, we believe that in the case *sub judice*, in determining whether the fall was the sole cause of plaintiff's disability within the meaning of the policy, it would be for the jury to consider the following factors: the seriousness of plaintiff's fall; his general health before the fall; and, the evidence as to the degree of disc degeneration before the fall.

The judgment of the trial court is

Reversed.

Judges VAUGHN and BECTON concur.

STATE OF NORTH CAROLINA v. ROBERT ARTHUR PACE

No. 8021SC803

(Filed 3 March 1981)

1. Rape § 5— use of force — sufficiency of evidence

The State's evidence in a prosecution for second degree rape and second degree sexual offense was sufficient to show that the acts against the victim were committed by force and against her will.

2. Rape § 4.1— evidence of prior rape — irrelevancy

In this prosecution for second degree rape and second degree sexual assault in which the victim testified that defendant wore a plaid jacket and referred to her as "Baby Girl" and consent by the victim was the only fact in issue, testimony by a State's witness that defendant wore a plaid jacket and used the term "Baby Girl" when he raped her some two months before the crimes in question was not competent to show identity, intent, motive, *modus operandi* or a common plan or scheme since there was no issue as to defendant's identity, intent or motive, and such testimony did not show a *modus operandi* or a common plan or scheme.

State v. Pace

APPEAL by defendant from *McConnell, Judge*. Judgment entered 5 June 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 January 1981.

Defendant was indicted for second degree rape and second degree sexual offense, violations of G.S. 14-27.3 and -27.5. He pleaded not guilty and was tried by a jury.

State's evidence tended to show that the victim, Cynthia LaVerne Hairston, and her boyfriend, Jasper Randleman, Jr., went to a bus station in Winston-Salem around midnight on 16 January 1980 in order for Hairston to get a bus to her home in Danville, Virginia. After waiting for some time, Randleman decided to borrow his mother's car in order to drive Hairston back to Virginia. He saw defendant, whom he recognized from school, at the bus station and asked defendant to give him a ride to his mother's house. Randleman and defendant left shortly before 4:00 a.m. At 4:25 a.m. defendant returned to the bus station alone and began talking with Hairston. She testified that he suggested that she sit in his car to warm up since it was cold in the bus station and that she agreed. Once they were in the car, defendant drove away. He drove across town and parked on a deadend street. Hairston's testimony continued:

So he said, "Come here." And I said, "What do you want?" He said, "I have something to tell you." I said, "Well, I can hear just fine from here." So, you know, he didn't — I didn't go over to his side, and he immediately slid over to my side. And I said, "Oh, my God, what are you going to do?" I said, "What are you going to do to me?" And he said, "Baby Girl, you can make this hard, or you can make it easy." And due to the fact that I was pregnant, I put up a little fight but not very much. And I said, "I can't be doing anything like this." I said, "I am eight months pregnant," and I said, "and my doctor advised strongly against things like this past the seventh month." He said, "Listen, I have dealt with women like you. I have dealt with women in your condition before, and if you will just calm down, everything will be okay, Baby Girl."

Right at that moment, he pulled me down onto the seat, knocking my head up against the window. He pulled off my blue jeans, panty hose, and panties, and then he told me to take alooose my blouse. And I said, "My blouse doesn't un-

State v. Pace

button all the way down, it only has three buttons.” Well, he just roughly grabbed the buttons and pulled them loose himself, and then he pulled my legs apart, forced his body on me, and began to have intercourse. I guess that went on for about twenty or twenty five minutes, and then he got up, and he fell back onto the seat behind the steering wheel, and he said that he wanted me to have oral sex. All at the same time he was pulling my hair and pulling my face over to his side. I told him that I couldn’t do anything like that, I didn’t want to do anything like that, I had never done anything like that before, and I didn’t even know how. He said, “well (sic), I will show you.”

So he took one hand and pushed my head down between his legs, and he took his other hand and he held his penis and put it into my mouth, and then he was telling me to open wide and take my hand and just rub up and down and up and down. So I guess that went on for about three or four minutes, and I told him that he was hurting my face on the steering wheel, but he still wouldn’t stop. Once again he just said, “Baby Girl, you can make this hard, or you can make it easy.” So I went ahead and did it. So after that, he got up, and he wanted to have intercourse again. He said, “You got to make me come on (sic) way or the other.” So I said, “I don’t feel like it.” I said, “You have hurt me already.” I said, “I can’t go through that again.” He said, “Well, either you can take it from the front or you can take it from the back.” And I said, “I can’t lay on my stomach,” I said, “because it hurts when I lay down that way.” And I said, “I can’t stay here any longer.” I said, “I will have to go back.” And he said, “Well, it is left up to you how long you stay here.” And then he got on top of me, had intercourse again.

Defendant then drove Hairston back to the bus station and put her out at about 6:00 a.m. Randleman returned to the bus station about an hour later, and they went to report the matter to police. Hairston described defendant as wearing a plaid blazer.

State also presented the witness Vickie Long Rorie. She testified, over objection, that she had met the defendant through a friend on 4 November 1979 and that later that night

State v. Pace

he had returned to her apartment and threatened her with a weapon and raped her. She testified that defendant had been wearing a plaid jacket and had referred to her as "Baby Girl."

Defendant testified that he returned to the bus station to buy cigarettes after giving Randleman a ride home and that Hairston approached him and started a conversation. She asked where she could buy reefer and he drove her to a friend's house to buy marijuana. The friend was not home, but defendant had two marijuana cigarettes and they smoked them. He testified that Hairston then slid over to his side of the car seat and they began fondling each other and engaged in intercourse. Defendant testified that he broke off the intercourse because he didn't think it right with Hairston being pregnant, but that she approached him again and unzipped his pants and performed fellatio until he pulled away. She asked him for \$25 and he said that he did not have it. He drove her back to the bus station and she said, "Well, you are going to pay one way or the other." Defendant admitted intercourse with Vickie Long Rorie on 4 November 1979, but stated that it had been with her consent.

Defendant was convicted as charged on both offenses and a consolidated judgment was imposed. He has appealed.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

David P. Mast, Jr., for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant first argues that the trial court erred by denying his motions to dismiss the charges due to the insufficiency of the evidence of force. He argues that the evidence raised no more than a suspicion or conjecture as to the use of force against the victim. We disagree. Both second degree rape and second degree sexual offense must be committed "[b]y force and against the will of the other person." G.S. 14-27.3 and -27.5. The testimony of the prosecuting witness tended to show that the acts were indeed committed by force and against her will, and defendant's motions for dismissal were properly denied.

[2] Defendant next argues that the trial court erred by allowing the testimony of Vickie Long Rorie and by instructing the

State v. Pace

jury on how to consider her testimony. The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense, even though the other offense is of the same nature as the crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). The opinion in *McClain* enumerates eight well-recognized exceptions to the general rule. Certain of these exceptions allow admission of evidence relevant to the defendant's identity, intent and motive. Another exception allows evidence tending to show a common plan or scheme embracing the commission of a series of related crimes notwithstanding the fact that it also shows defendant's commission of another crime. *Id. Stansbury* states the law as follows:

Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.

1 Stansbury's N.C. Evidence, § 91 (Brandis rev. 1973).

The trial court allowed Vickie Long Rorie to testify that defendant had raped her some two months before the present alleged crimes on grounds that her testimony tended to show the identity and *modus operandi* of the defendant. In its charge the trial court instructed the jury to consider Rorie's testimony solely for the purposes of establishing identity, *modus operandi*, intent, motive, and a plan or scheme of the defendant involving sex crimes. However, even before Rorie was called as a witness, defense counsel had informed the trial court that he would rely upon the defense of consent; and by the time the jury instructions were given, it was quite clear that consent was the fact in issue. Thus, none of the permissible purposes to which Rorie's testimony might have been put was relevant in this case. There was no issue as to defendant's identity, since his own testimony tended to show that he was with the prosecuting witness at the time involved and that acts of intercourse and fellatio did occur. There was no issue as to defendant's intent or motive. The issue, rather, was the state of mind of the prosecuting witness, whether the acts were committed by force and

State v. Pace

against her will. The mere fact that defendant wore a plaid jacket and used the term "Baby Girl" with both Rorie and the prosecuting witness does not show a *modus operandi* or bring Rorie's testimony within the "common plan or scheme" exception of *McClain*. Compare *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972). These two similarities tended to show identity, but identity was not at issue. It is true that our appellate courts have been quite liberal in construing the exceptions to the general rule of *McClain* when similar sex crimes are involved. *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978); 1 Stansbury, *supra*, § 92. However, we cannot extend this liberality to the present situation. Evidence which has no logical tendency to prove a fact in issue is inadmissible, and its admission will constitute reversible error if it is of such a nature as to mislead the jury or prejudice the opponent. *Pearce v. Barham*, 267 N.C. 707, 149 S.E. 2d 22 (1966); 1 Stansbury, *supra*, § 77. Here, the testimony of Vickie Long Rorie was not relevant to the fact in issue. Her testimony tended to show the bad character of the defendant and his disposition to commit sex crimes. This the State may not do. See *State v. Whitney*, 26 N.C. App. 460, 216 S.E. 2d 439 (1975). We cannot say that the admission of this testimony was harmless since the defense relied so heavily upon defendant's credibility.

Defendant's remaining assignments of error relate to evidentiary rulings and jury instructions which may not occur upon retrial, and we will therefore not address them.

New trial.

Judges VAUGHN and BECTON concur.

Trucking Co. v. Phillips

VANCE TRUCKING COMPANY, INC. AND MYRTLE N. WALKER, ADMINISTRATRIX OF THE ESTATE OF HORACE HOBART WALKER V. ALLEN ROSS PHILLIPS, ED KEMP ASSOCIATES, INC. AND CHARLES JENNINGS GEORGE, JR.

No. 8014SC693

(Filed 3 March 1981)

1. Automobiles § 50— cars changing lanes on interstate – sufficiency of evidence of negligence

In an action to recover for property damage and wrongful death arising from a collision involving two cars driven by defendants and a tractor trailer driven by plaintiff's intestate, evidence was sufficient to raise issues of fact as to whether plaintiff's intestate's injuries were proximately caused by defendants' negligence and whether plaintiff's intestate was contributorily negligent where the evidence tended to show that both defendants had consumed beer prior to the time of the accident giving rise to this action; an automobile driven by one defendant entered I-85 from an access ramp, pulled into the lane behind the other defendant, passed the other defendant, and in doing so tapped the left rear bumper of the other defendant; the defendant who had entered from the access ramp slowed down, abruptly moved across the lane in front of the second defendant, and once again entered the access lane; the second defendant moved his automobile into the access lane behind the first defendant without looking behind him or giving a turn signal; both vehicles began to brake hard; plaintiff's intestate's truck came into contact with the second defendant's car and jackknifed, blocking the highway; and plaintiff's intestate was pinned inside the cab and later died from injuries received in the collision.

2. Automobiles § 45.6— breathalyzer tests – admissibility of results in wrongful death action

In an action to recover for property damage and wrongful death arising from a collision involving two cars driven by defendants and a tractor trailer driven by plaintiff's intestate, the trial court erred in excluding testimony concerning breathalyzer tests administered to defendants three or four hours after the fatal collision, since both defendants testified that they had drunk beer before the accident; the investigating officer testified that, while at the scene of the accident, he formed the opinion that both defendants were intoxicated; and the excluded testimony was nothing more than additional evidence from which the jury could have found that defendants were intoxicated and unable to exercise due care in the operation of their cars.

3. Automobiles § 47— condition of highway after accident – evidence improperly excluded

In an action to recover for property damages and wrongful death arising from an automobile accident, the trial court erred in excluding the investigating patrolman's testimony concerning a gouge mark in the road surface and testimony by an engineer concerning the presence and location of marks near the accident scene which he personally observed, since any lack of

Trucking Co. v. Phillips

credibility, given the number of possible marks and the possibility that additional marks were made since the accident, was a matter for the jury.

4. Rules of Civil Procedure § 15.2— amendment of complaint improperly denied

The trial court erred in refusing to allow plaintiffs to amend their pleadings so as to place them in conformity with the evidence where the proposed paragraphs did nothing more than make more specific certain allegations contained in the original complaint; the testimony the amendments were based on was unobjected to at trial; and the contention that the evidence was known to plaintiffs at the time they drew up their complaint and thus was no surprise to them was irrelevant, as defendants failed to show how the amendments would prejudice them in maintaining their defense.

APPEAL by plaintiffs from *Godwin, Judge*. Judgment entered 23 January 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 February 1981.

These are consolidated actions for property damage and wrongful death arising from a collision involving two cars and a tractor trailer driven by plaintiff Walker's intestate. The issues of liability and damages were bifurcated, and the liability issue heard first. At the close of plaintiffs' evidence, the trial court granted defendants' motions for a directed verdict. From the court's action, plaintiffs have appealed.

Biggs, Meadows, Batts, Etheridge & Winberry, by M. Alexander Biggs and Auley M. Crouch III, for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter, Frank J. Sizemore III and Alan W. Duncan, for defendant appellees Allen Ross Phillips and Ed Kemp Associates, Inc.

Haywood, Denny & Miller, by George W. Miller Jr., for defendant appellee Charles Jennings George Jr.

HILL, Judge.

"A motion for a directed verdict raises the question as to whether there is sufficient evidence to go to the jury." Shuford, N.C. Civil Practice and Procedure § 50-5, p. 410. "The plaintiff's evidence must be taken as true and be considered in the light most favorable to him. . . . All conflicts in the evidence must be resolved in the plaintiff's favor and . . . [c]ontradictions, conflicts and inconsistencies which appear in the evidence are to be resolved in the plaintiff's favor." *Id.* "Acts of contributory negligence not alleged in the answer should be ignored." *Bowen v. Gardner*, 275 N.C. 363, 366, 168 S.E. 2d 47 (1969).

Trucking Co. v. Phillips

Plaintiffs' evidence, when subjected to the rules stated above and considered in the light most favorable to plaintiffs, would permit a jury to find the following facts.

Late during the night of 2 July 1975, defendant Phillips was driving his company's Pinto station wagon west toward Greensboro on highway I-85. The sky was clear and the pavement dry. Earlier during the night, Phillips had stopped in Durham for dinner at which time he had drunk some beer.

At approximately 12:30 a.m., Phillips reached a spot on I-85, east of Greensboro, where Mount Hope Church Road passes over the highway. The highway is in effect a three-lane road at that spot because the large amount of traffic exiting off Mount Hope Church Road onto I-85 necessitates that the acceleration lane be approximately three-fourths of a mile longer than usual.

When Phillips passed under the overpass, he was being followed by a Vance truck being driven by plaintiffs' intestate. Phillips was in the center lane traveling about 52 m.p.h. The deceased trucker, Walker, was four or five truck lengths behind him and traveling at a speed less than the speed limit.

Suddenly a Dodge Charger driven by defendant George came down the access ramp to Phillips' right. The Charger pulled into the center lane behind Phillips and then passed the Pinto; but in doing so, tapped the left rear bumper of the Pinto.

The Charger accelerated in the far left lane, and Phillips began blinking his lights and sounding his horn. After the Charger had moved about 150 to 200 feet in front of the Pinto, it slowed down and then abruptly moved across the center lane back over to the access lane.

Phillips moved his Pinto into the access lane behind George's Charger without looking behind him or giving a turn signal. Both vehicles began to brake hard; and, as Phillips stated, at this point, "[t]he left rear bumper of my car came in contact with the front right corner of the [Vance] truck." The truck jackknifed, blocking the highway. Walker was pinned inside the cab and later died from injuries received in the collision.

Trucking Co. v. Phillips

In addition to the facts catalogued above, plaintiffs' evidence, when considered in the light most favorable to plaintiffs, would permit a jury to find the following facts.

At the time of the collision, a rental truck was in the far left-hand lane "running about neck and neck with the Vance truck." A trucker following the Vance truck saw Walker's brake lights come on and heard a crashing noise instantly thereafter. At the moment before the crashing noise, "*the Vance truck was in the [center] lane, and no part of [the truck] was over in the [access] lane.*" The jury could also find that both Phillips and George were intoxicated at the time of the accident.

[1] The issues thus become first, whether plaintiffs have offered sufficient evidence which, when considered in accordance with the tests we have set forth above, tends to show that the property damage and Walker's death were proximately caused by the defendants' negligence, and second, whether the evidence establishes as a matter of law that plaintiffs' intestate was contributorily negligent. *Sessoms v. Roberson*, 47 N.C. App. 573, 577-78, 268 S.E. 2d 24 (1980), *citing Ryder v. Benfield*, 43 N.C. App. 278, 258 S.E. 2d 849 (1979). We find that the evidence is such as to permit different inferences to be drawn as to each issue. Thus, we hold that the trial court erred by granting defendants' motion for directed verdict.

In addition to assigning as error the trial judge's granting of the directed verdict, plaintiffs have brought forth several more questions on appeal. Although we have held that the trial court erred in granting the directed verdict and feel that the admitted evidence was sufficient to lead us to that conclusion, we feel it is necessary for us to rule on the additional questions since this case may now proceed to trial.

[2] Plaintiffs assign as error the trial court's exclusion of testimony concerning breathalyzer tests administered to the defendants.

Plaintiffs sought to introduce testimony showing that at 4:20 a.m. on 2 July — almost four hours after the fatal collision — defendant Phillips registered .07 on the breathalyzer. Plaintiffs sought to show that defendant George registered .10 on the breathalyzer three hours after the accident. Plaintiffs further sought to introduce expert medical testimony which would

Trucking Co. v. Phillips

have shown that, given those readings, defendant George would have registered .15 on the breathalyzer at the time of the fatal collision and defendant Phillips would have registered between .11 and .12.

The testimony described above should have been admitted. See *McNeil v. Williams*, 16 N.C. App. 322, 191 S.E. 2d 916 (1972). Whether he is the proximate cause of any injury, "[u]nquestionably a motorist is guilty of negligence if he operates a motor vehicle . . . while under the influence of [an] intoxicating [beverage]." *Atkins v. Moye*, 277 N.C. 179, 186, 176 S.E. 2d 789 (1970). Both defendants had testified they had drunk beer before the accident. The investigating officer testified that while at the scene of the accident he formed the opinion that both defendants were intoxicated. The excluded testimony was nothing more than additional evidence from which the jury could have found that defendants were intoxicated and unable to exercise due care in the operation of their cars. The trial court erred when it excluded the evidence.

[3] Plaintiffs assign as error the trial judge's exclusion of the investigating patrolman's testimony concerning a gouge mark in the road surface.

Trooper Holman was at the scene of the collision shortly after it occurred and returned to the scene later that day to investigate the accident. Holman testified that he observed a large amount of black skid marks that started in the center lane. The trooper further stated after objection and out of the presence of the jury that he observed a gouge mark in the center lane.

We find that Holman should have been allowed to testify concerning the gouge mark. See *Farrow v. Baugham*, 266 N.C. 739, 741, 147 S.E. 2d 167 (1966). Any lack of credibility, given the number of possible gouge marks and the possibility that additional marks were made since the accident, was a matter for the jury.

Plaintiffs have further assigned as error the trial court's refusal to allow testimony by William Wallace, an engineer, concerning the presence and location of marks near the accident scene which he personally observed. We have considered all of plaintiffs' exceptions grouped within this assignment and

State v. Brooks

find one to be of merit. Wallace should have been allowed to testify concerning the gouge mark referred to above, as both his independent observation and as corroboration of Holman. Any lack of credibility, given the passage of time between the collision and Wallace's observation and the rather unscientific comparison made by Wallace of the asphalt, is a matter for the jury.

[4] Plaintiffs assign as error the trial court's refusal to allow them to amend their pleadings so as to place them in conformity with the evidence. We agree with plaintiffs and hold that the pleadings should have been amended pursuant to G.S. 1A-1, Rule 15(b). The proposed paragraphs do nothing more than make more specific certain allegations contained in the original complaints. The testimony the amendments are based on was unobjected to at trial. The contention that the evidence was known to plaintiffs at the time they drew up their complaint and thus was no surprise to them is irrelevant since defendants failed to show how the amendments would prejudice them in maintaining their defense.

We have examined plaintiffs' remaining assignment of error regarding portions of witness Armstrong's deposition and find it to be without merit. The judgment of the trial court granting the directed verdict is

Reversed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. GLENN A. BROOKS

No. 8012SC807

(Filed 3 March 1981)

1. Searches and Seizures § 39- search of person on premises searched under warrant

The search of defendant's person after the search of a private residence pursuant to a warrant was authorized by G.S. 15A-256 where an SBI agent received reliable information that two men, a black male and a white male, had 100 grams of hashish for sale at a particular private residence; a purchase of the 100 grams was arranged for a certain evening; officers went to the residence that evening with a search warrant; a search of the residence pursuant to the warrant turned up approximately 98 grams of hashish, but none of the hashish found was in a form which would indicate it was ready for

State v. Brooks

sale; and officers decided that defendant, who was at the residence when officers first went there, should be searched for hashish since the object of the search, ready-to-sell hashish, had not been discovered and could be concealed upon defendant's person.

2. Searches and Seizures § 10— probable cause “particularized” to defendant

Officers had sufficient probable cause “particularized” to defendant to search defendant's person after executing a warrant to search a private residence where an SBI agent had received reliable information that two men, a black male and a white male, had 100 grams of hashish for sale at the residence and that a sale was to take place on a certain evening; officers went to the residence that evening with a search warrant to search the premises, but the search failed to turn up any hashish that was ready for sale; and officers had reason to believe that defendant, a white male who was at the residence when officers first went there, might have the ready-to-sell hashish on his person since they knew it was supposed to be at the residence at that time and it could easily be concealed upon the person of anyone present at the residence.

APPEAL by defendant from *Martin, Judge*. Judgment entered 14 April 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 January 1981.

Defendant was charged under a proper bill of indictment with possession with intent to sell and deliver a controlled substance (hashish) in violation of G.S. § 90-95(a)(1). On 21 February 1980, defendant filed a motion to suppress evidence seized as a result of a search of defendant. After a hearing on the motion at the 24 March 1980 “Criminal Session” of Cumberland County Superior Court, the court made the following findings of fact:

1. That on December 17, 1979, Special Agent Steven G. Porter of the North Carolina State Bureau of Investigation was contacted by two confidential sources of information who related to him that they had met a white male named Glenn and a black male named Curt and had been in Curt's residence located at 5700 Comstock Court. While there, the two informants had observed a large quantity of hashish and had arranged for Porter to go there at 7:00 to buy One Hundred (100) grams of hashish for the sum of Six Hundred Dollars (\$600.00).

2. That based upon this information, Agent Porter obtained a search warrant . . . to search the residence located at 5700 Comstock Court.

State v. Brooks

3. That Agent Porter and other agents then proceeded to 5700 Comstock Court to execute the search warrant. Upon arrival at that address, Agent Porter was allowed entry by a black female, Mrs. Mary Fuller. Also present in the house were a black male, Curtis Wayne Fuller and a white male, Glenn Allen Brooks. That the house was identified to Agent Porter as belonging to Curtis Wayne Fuller. That Agent Porter read the search warrant to Mrs. Fuller, Curtis Fuller and Glenn Brooks and then began a search of the residence.

4. That, in a bedroom, Agent Porter found 4.6 grams of hashish in a film can and 98.5 grams of hashish in a minila [sic] folder between some books stuffed behind a box. A further search of the house failed to produce the One Hundred (100) grams of hashish which Agent Porter sought. After field testing the hashish, Agent Porter placed Curtis Fuller under arrest and thoroughly searched him, finding no more controlled substances.

5. That Agent Porter determined from the way the hashish which he had found was packaged, in between books in a manila envelope and behind a box, that those drugs were not the drugs for immediate sale to him for which he was searching. That Agent Porter then searched the defendant Brooks and found an envelope in the top band of his sock. This envelope contained 23.5 grams of hashish.

6. That Agent Porter, pursuant to a valid and proper search warrant, was directing a search of premises, not generally open to the public. That his search of the named premises and the person of defendant Fuller had failed to produce the object of the search. That the object of the search could be concealed upon a person. That Glenn Brooks was present at 5700 Comstock Court at the time of Agent Porter's entry.

Based on these findings, the court concluded that the search of the defendant "did not violate the provisions of the United States Constitution nor any other rights of the defendant Brooks and was in compliance with the provisions of North Carolina General Statutes 15A-256" and denied defendant's motion. Defendant thereafter entered a plea of guilty to felo-

State v. Brooks

nious possession hashish [G.S. § 90-95(a)(3)], and from a judgment entered thereon imposing a prison sentence of “not less than Three Years nor more than Three Years,” defendant appealed pursuant to G.S. § 15A-979(b).

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Assistant Public Defender William L. Livesay, for the defendant appellant.

HEDRICK, Judge.

The sole question presented by this appeal is whether the court erred in denying defendant’s motion to suppress.

G.S. § 15A-256 provides:

An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer’s entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person, but no property of a different type from that particularly described in the warrant may be seized or may be the basis for prosecution of any person so searched. For the purpose of this section, all controlled substances are the same type of property.

[1] Defendant first contends that the trial judge erroneously concluded that the search of defendant complied with the requirements of G.S. § 15A-256. We do not agree. Under the cited statute, if a search of the premises described in a valid search warrant fails to produce the items named in the warrant, officers may then conduct a search of a person, whether named in the warrant or not, who is on the premises at the time of the officer’s entry thereon. Such a search is limited, however, to “the extent reasonably necessary” to find the property particularly described in the warrant, or, in the case of a search warrant for a controlled substance, any controlled substance. The

State v. Brooks

search is also limited to items that could be concealed upon the person.

In the present case, the court's findings in its order denying defendant's motion to suppress indicate that after receiving reliable information as to the availability for sale of one hundred grams of hashish at a private residence, Agent Porter and other officers obtained a warrant, the validity of which is not questioned, authorizing a search of that residence for the hashish. The findings also show that upon arriving at the residence, the officers served the warrant and began a search of the premises, which ultimately turned up approximately 98 grams of hashish, but none of the hashish found was in a form which would indicate it was ready for sale. The findings further demonstrate that since the object of the search, ready-to-sell hashish, had not been discovered, and since the object of the search could be concealed upon the person of those who were at the residence when the officers entered, the officers decided that defendant, who was at the residence at the time of entry, should be searched for the hashish. The findings then indicate that a search of defendant turned up 23.5 grams of hashish that had been hidden in the top band of the defendant's sock.

The court's findings, not challenged by defendant, are conclusive on appeal if they are supported by competent evidence in the record, *State v. Prevette*, 43 N.C. App. 450, 259 S.E. 2d 595 (1979), *disc. rev. denied and appeal dismissed*, 299 N.C. 124, 261 S.E. 2d. 925 (1980), and the record in this case contains ample competent evidence which supports the findings made by the trial judge. The findings are thus conclusive, and, in turn, obviously support the court's conclusion that the search of defendant met the requirements of G.S. § 15A-256. Defendant's contention is therefore without merit.

[2] Defendant next contends that even if the search of defendant compiled with G.S. §15A-256, the search was nevertheless unconstitutional. Citing *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979), defendant argues that the Fourth Amendment prohibition against unreasonable searches and seizures requires that probable cause to search be "particularized" to the individual to be searched, and since the search warrant in the present case referred only to the premises at 5700 Comstock Court, and not any person present, probable

State v. Brooks

cause “particularized” to defendant was therefore lacking. We cannot agree.

In *Ybarra v. Illinois*, *supra*, the United States Supreme Court (Stewart, J.) stated as follows:

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed [footnote omitted]. But, a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron v. New York*, 392 U.S. 40, 62-63. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the “legitimate expectations of privacy” of persons, not places. [citations omitted]

Id. at 91, 62 L. Ed. 2d at 245, 100 S. Ct. at 342.

The *Ybarra* Court emphasized that none of the circumstances present would have suggested to the police that Ybarra was somehow connected with the criminal activity to which the search warrant was addressed, and therefore no probable cause to search Ybarra existed. The circumstances in the instant case, however, were quite different. The record indicates that Agent Porter had received reliable information that two men, a black male and a white male, had one hundred grams of hashish for sale at a particular private residence. The sale was to take place on the evening of 17 December 1979. The officers went to the residence that evening with a search warrant to search the premises, but the search failed to turn up any hashish that was ready for sale. Since the officers knew that ready-to-sell hashish was supposed to be at the residence at that time, and since such hashish could easily be concealed upon the person of those present, the officers had reason to believe that defendant, a white male, might have the ready-to-sell hashish on his person. In our view, therefore, the officers had probable cause, “particularized” with respect to defendant, to search defendant.

State v. Brooks

Moreover, the limited search of persons on the premises allowed by G.S. § 15A-256 has previously been held constitutional. In *State v. Watlington*, 30 N.C. App. 101, 226 S.E. 2d 186, *cert. denied and appeal dismissed*, 290 N.C. 666, 228 S.E. 2d 457 (1976), this Court, per Judge Arnold, stated:

Only those searches and seizures that are unreasonable are prohibited by the Fourth Amendment. Where police officers have a warrant authorizing the search of a vehicle or premises it is reasonable to permit a search of persons found in the vehicle or on the premises, within the restrictions of G.S. § 15A-256, to prevent those persons from concealing the contraband subject matter described in the search warrant.

Id., at 103, 226 S.E. 2d at 188. We do not believe that the decision in *State v. Watlington*, *supra*, is in any way adversely affected by the above-cited rule from *Ybarra v. Illinois*, *supra*. Probable cause “particularized” to those present on the premises being searched can be clearly inferred from the circumstances under which the limited search pursuant to G.S. § 15A-256 is authorized: Police officers have reason to believe that criminal activity has been or is occurring on the premises, the search pursuant to the warrant fails to uncover any evidence of such activity, and such evidence of the criminal activity could be concealed upon the person of those present at the time of the officer’s entry.

We are therefore of the opinion that the search conducted in the present case was constitutional, and defendant’s contention is without merit.

The trial court’s order denying defendant’s motion to suppress is

Affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

State v. Berry

STATE OF NORTH CAROLINA v. MELVIN BERRY

No. 8029SC871

(Filed 3 March 1981)

1. Criminal Law § 91– statutory right to speedy trial not denied

Defendant's right to a speedy trial as provided by G.S. 15A-701 was not violated, though defendant was indicted on 5 December 1979 and tried more than 120 days later during the April 1980 session of criminal court in McDowell County, since McDowell County is a county where, due to the limited number of court sessions scheduled for the county, the time limitations of G.S. 15A-701 cannot reasonably be met; therefore, pursuant to G.S. 15A-701(b)(8), the 120-day requirement for trial did not apply to defendant's trial.

2. Criminal Law § 91.8– motion for continuance – timeliness

There was no merit to defendant's contention that the trial court's denial of his oral motion for a continuance constituted an abuse of the trial judge's discretion and denied him due process of law and the effective assistance of counsel, since defendant's motion was not timely made; defendant's counsel was appointed before the time written notice of continuance was required to have been filed and the attorney had spoken with defendant; and defendant had vigorously represented himself before asking, just seven days before his trial, that counsel be appointed and at no time requested a continuance.

3. Bills of Discovery § 6– opportunity to conduct discovery not denied

There was no merit to defendant's contention that the trial judge's denial of the opportunity to conduct discovery after counsel was appointed violated G.S. 15A-902, since that statute did not guarantee defense counsel at least ten days after he was appointed in which to conduct discovery, but instead gave defendant the right to seek discovery not later than the tenth day after appointment of counsel; defendant did this during his vigorous representation of himself; and defendant therefore could not argue that, since the State did not comply with the statutory discovery procedure, he had ten more days to conduct discovery.

4. Criminal Law § 98– trial in prison clothes

There was no merit to defendant's contention that the trial court erred by permitting defendant, over objection, to be tried in the uniform of a prisoner, where the record showed that defendant was dressed in green pants, tennis shoes, white socks and a T-shirt; there was no showing by defendant that he was required by his jailers to appear in prison garb in violation of G.S. 15-176; and there was no affirmative showing that defendant was in fact dressed in a prison uniform.

5. Criminal Law § 99.2– affirmative defenses – judge's question not prejudicial

There was no merit to defendant's contention that the trial judge erred by asking defense counsel in the presence of the jury whether there were any affirmative defenses of which counsel wished the judge to inform the jury,

State v. Berry

since the trial judge merely insured that defendant exercised his opportunity to bring forward any affirmative defense he might have.

APPEAL by defendant from *Seay, Judge*. Judgment entered 17 April 1980 in Superior Court, McDOWELL County. Heard in the Court of Appeals 3 February 1981.

On 4 September 1979, several inmates confined at the McDowell County Unit of the Department of Correction overwhelmed their guards and escaped. The State's evidence shows that defendant was among those inmates involved.

Prison guard Ronnie Harvey testified for the State that on the day of the escape he was waiting at the door of a segregation unit for some other guards when he saw defendant and another inmate rush up to the door. Harvey testified that Berry pointed a revolver at him through the bars and forced him to open the door. Berry then forced the guard up a hall to an area between two dormitories where Berry ordered him to lie down on the floor. Harvey testified that defendant took his watch and billfold and other inmates took his uniform. Defendant was apprehended fifteen hours after the escape, still dressed in his prison clothes, with no weapon, money or watch in his possession.

Defendant testified that although he escaped, he had nothing to do with kidnapping Harvey. A fellow inmate testified that he saw defendant escape, but never saw him in possession of a weapon.

The jury found defendant guilty of the felony of kidnapping, and the judge imposed an active sentence of twenty-five years to begin at the expiration of a two-year sentence for escape imposed in a prior trial. Defendant appeals.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Associate Attorney Jane P. Gray, for the State.

Goldsmith & Goldsmith, by C. Frank Goldsmith Jr., for defendant appellant.

HILL, Judge.

Defendant argues in his first assignment of error that his trial, more than 120 days after his indictment, violated his

State v. Berry

statutory and constitutional rights to a speedy trial. We note that defendant has not presented any authority for or discussed the basis of his assignment on constitutional grounds. Thus, we deem any assignments concerning defendant's Sixth Amendment right to a speedy trial to be abandoned. App. R. 28(a); *Love v. Pressley*, 34 N.C. App. 503, 514, 239 S.E. 2d 574 (1977), *disc. rev. denied* 294 N.C. 441 (1978).

[1] Was defendant's statutory right to a speedy trial, as provided by G.S. 15A-701, violated? We hold that it was not.

Defendant was indicted on 5 December 1979 and tried more than 120 days later during the April 1980 session of criminal court in McDowell County. Two weeks of criminal court were scheduled in December 1979. One session began the week defendant was indicted; the other began 17 December but apparently did not run the full week. Another week of criminal court was scheduled for 14 January, but transferred to Rutherford County by order of the Chief Justice. No other sessions of criminal court were scheduled for McDowell County until the session during which defendant was tried.

We find that McDowell County is a county where, due to the limited number of court sessions scheduled for the county, the time limitations of G.S. 15A-701 cannot reasonably be met. Therefore, pursuant to G.S. 15A-701(b)(8), we hold that the 120-day requirement does not apply to defendant's trial. It is irrelevant that the defendant was not tried during the second week of December and that the term of court in January was transferred. Defendant has made no showing that he was ready, willing and able to go to court at those times and thus has not shown that the delay in his trial was occasioned by anything other than the venue of defendant's case being within a county with a limited number of court sessions. Defendant's first assignment of error is without merit and overruled.

[2] Defendant assigns as error the trial judge's denial of his oral motion for a continuance. Defendant contends that the denial constituted an abuse of the trial judge's discretion and denied him due process of law and the effective assistance of counsel.

We note initially that defendant's motion was not timely made.

State v. Berry

G.S. 15A-952(c) provides that where, as here, arraignment is to be held at the session for which trial is calendared, a motion to continue 'must be filed on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins.' In such case the motion must be in writing, stating the grounds therefor and the relief sought. G.S. 15A-951(a). By waiting until the session for which his trial was calendared and then making an oral motion to continue, defendant failed to comply with these statutes. Defendant's failure to make a timely motion [is] in itself sufficient basis for its denial.

State v. Evans, 40 N.C. App. 390, 391, 253 S.E. 2d 35 (1979). The record shows that defendant's counsel was appointed before the time written notice of continuance was required to have been filed and that he had spoken with his client. Furthermore, the record shows that defendant had vigorously represented himself before asking, just seven days before his trial, that counsel be appointed and at no time requested a continuance. Defendant's assignment of error is without merit and overruled.

[3] Defendant contends in his third assignment of error that the trial judge's denial of the opportunity to conduct discovery after counsel was appointed violated G.S. 15A-902. We do not agree.

G.S. 15A-902 governs discovery procedures in a criminal trial. The statute provides that a party must first request in writing that the other party voluntarily comply with the discovery request. Defendant in the case *sub judice* made such a request on 19 December 1979. The district attorney's office received the request on 3 January 1980, but failed to comply with defendant's request.

G.S. 15A-902(a) further provides that "upon the passage of seven days following the receipt of the request without response" the defendant may file a motion to compel discovery. This the defendant did *pro se* on 27 March 1980. Apparently the superior court took no action on defendant's motion because the trial judge was not even aware the motion was in his file when defendant's case came to trial. Nevertheless, pursuant to G.S. 15A-910, discovery was ordered at trial before any witnesses were called.

State v. Berry

It is not, however, the dilatoriness of the district attorney of which defendant complains in his third assignment of error. Defendant is contending that G.S. 15A-902(d) should be interpreted to mean that, under the facts of this case, defense counsel was guaranteed at least ten days after he was appointed in which to conduct discovery. The subsection reads in pertinent part that:

If a defendant is not represented by counsel . . . , *he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after*

- (1) The defendant's consent to be tried upon a bill of information, or the service of notice upon him that a true bill of indictment has been found by the grand jury, or
- (2) *The appointment of counsel — whichever is later.* (Emphasis added.)

It is clear that G.S. 15A-902(d) does not give defense counsel rights. The subsection gives *the defendant* the right to seek discovery not later than the tenth day after the appointment of counsel. This the defendant did during his vigorous representation of himself. Defendant cannot now argue that since the State did not comply with the discovery procedure he has ten more days. Defendant, like all defendants, is restricted to seeking those sanctions set forth in G.S. 15A-910 and applied by the trial judge in this case. Defendant's assignment of error is without merit and overruled.

[4] Defendant argues in his fourth assignment of error that the trial court erred by permitting defendant, over objection, to be tried in the uniform of a prisoner. The record shows that defendant was dressed in green pants, tennis shoes, white socks and a white T-shirt. It is possible to conclude from the record that all other prisoners who had appeared before the jury that week with regard to the prison break had been dressed in the same manner as was defendant.

Defendant has made much the same argument as was unsuccessfully made in *State v. Westry*, 15 N.C. App. 1, 12, 189 S.E. 2d 618, *cert. denied* 281 N.C. 763 (1972). In *Westry* the Court pointed out that G.S. 15-176 is not as broad as defendant in that case contended. The statute provides that while it is unlawful

State v. Berry

for any sheriff, jailer or other officer *to require* a prisoner to appear in court for trial dressed in the uniform of a prisoner, it is not necessarily unlawful for a prisoner to so appear. The statute provides only that no person charged with a criminal offense shall be tried while in the uniform of a prisoner “*by or under the direction and requirement* of any sheriff, jailer or other officer . . . ”

In the instant case, there has been no showing by defendant that he was required *by his jailers* to appear in prison garb. In fact, just as in *Westry*, there has been no affirmative showing that defendant was in fact dressed in a prison uniform. Defendant’s assignment of error is without merit and is overruled.

[5] Defendant contends in his fifth assignment of error that the trial court erred when the judge asked defense counsel in the presence of the jury whether there were any affirmative defenses of which counsel wished the judge to inform the jury. Defendant contends that such a question, when there was no affirmative defense, cannot help but tend to prejudice the jury at the very outset of the case.

G.S. 15A-1213 requires the trial judge, prior to selection of jurors, to briefly inform the prospective jurors of several things, one of which is “any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice.” Defendant had not given any pretrial notice of an affirmative defense, which failure constituted a waiver, but the trial judge is empowered by Article 52 to grant relief from such a waiver. Thus, we hold that the trial judge did not err when he merely insured that defendant exercised his opportunity to bring forward any affirmative defense he might have. Defendant’s assignment of error is without merit and is overruled.

We have carefully examined defendant’s remaining assignments of error, find them to be without merit and overrule each one. In the trial of defendant’s case we find

No Error.

Judges ARNOLD and WELLS concur.

Harris v. Harris

CLEVE G. HARRIS AND WIFE, JUDITH S. HARRIS v. C. ROGER HARRIS, SHIRLEY T. HARRIS, AND J.H. McCORMICK AND WIFE, MILDRED C. McCORMICK

No. 8017SC639

(Filed 3 March 1981)

1. Partition § 6— partition proceeding – effect of tobacco allotment – testimony by cotenant

In this proceeding to determine whether land should be partitioned in kind or by sale, a cotenant had sufficient familiarity with the property and with tobacco allotment procedures to permit him to state an opinion as to whether the apportionment of a tobacco allotment among the individual tracts would increase or decrease the value of the entire property where the cotenant testified that he was a farmer familiar with tobacco allotment apportionment and had recently helped with such a procedure, the cotenant stated he had managed these particular tracts as well as other farmland, and the cotenant described the physical nature of the land, its improvements, and its uses.

2. Partition § 6— partition by sale rather than in kind – sufficiency of evidence

In a partition proceeding in which the court concluded that the tracts of land in question should be partitioned by sale rather than in kind, the evidence supported findings by the court concerning a purchase money deed of trust on the entire property which could not be prepaid, the dissimilarity of the nature, location and condition of the tracts, the lack of balance among their uses, the presence of a cemetery and access road on one tract, and the tobacco allotment on the tracts.

3. Partition § 6.1— partition by sale – court's use of "prejudice" rather than "injury"

The trial court's use of the term "prejudice" rather than "injury" in determining that land should be sold rather than partitioned in kind did not render the court's order invalid, since "prejudice" was not tantamount to mere "inconvenience."

APPEAL by respondent Shirley T. Harris from *Riddle, Judge*. Judgment entered 14 February 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 16 January 1981.

This case arises out of a special proceeding petition seeking partition by sale of property held by tenants in common.

Petitioner Cleve G. Harris owns a 50 percent undivided interest in six tracts of land in Surry County. His wife, Judith S. Harris, is a party only by virtue of her contingent marital interest in the property. Respondent C. Roger Harris owns a 31-¼ percent undivided interest, and respondent Shirley T.

Harris v. Harris

Harris, former wife of C. Roger Harris, owns an 18- $\frac{3}{4}$ percent undivided interest in the property. Respondents J.H. and Mildred C. McCormick are holders of a note and deed of trust securing an indebtedness on all the land.

Petitioners seek to have the property sold for purpose of division, alleging that the best interests of all the parties would be served thereby. Respondent Shirley T. Harris filed an answer denying that the property could not be divided in kind and sought to have commissioners appointed to apportion the property.

The deed of trust provides for payments to be made annually on the note, ending in 1985. It further provides: "This note cannot be paid before the due dates." In their answer, the McCormicks prayed that the property be sold subject to their deed of trust, and petitioners replied with a prayer to the same effect.

The matter was heard by the clerk of the superior court of Surry County, who ordered that the property be sold at public auction. Shirley T. Harris and the McCormicks appealed to the superior court.

At the hearing the parties stipulated that the only issue was whether the land should be partitioned in kind or sold for the purpose of division. Only petitioner Cleve G. Harris presented evidence. The court entered findings of fact and conclusions of law. From the court's order that the property be sold at public auction, subject to the deed of trust, respondent Shirley T. Harris appeals.

Gardner, Gardner, Johnson & Etringer, by Gus L. Donnelly, for petitioner appellees.

Hatfield and Allman, by James W. Armentrout, for respondent appellant.

MARTIN (Harry C.), Judge.

[1] Appellant first contends that the trial court erred in allowing Cleve G. Harris to testify, over objection, as to his opinion of whether the apportionment of the tobacco allotment among the individual tracts would increase or decrease the value of the entire property. She argues that the witness was not qualified

Harris v. Harris

as an expert and that his opinion had no probative value or proper foundation.

Any witness, not necessarily an expert, may give his opinion of the value of specific real property if he has knowledge gained from experience, information, and observation. 1 Stansbury's N.C. Evidence § 128 (Brandis rev. 1973). Cleve Harris testified that he was a farmer familiar with tobacco allotment apportionment, having recently helped with such a procedure. As a co-owner, he had managed these particular tracts, as well as other farmland. He described the physical nature of the land, its improvements, and its uses. We hold that he had sufficient familiarity with the property and with allotment procedures to form an opinion as to the effect of division.

Furthermore, the evidence was heard by the judge sitting without a jury.

This type of hearing is different and is governed by rules of evidence different from those followed in jury trials. The Judge's experience and learning enabled him to weigh and to evaluate the testimony and to disregard that which under strict rules would be inadmissible in a jury trial.

Cotton v. Cotton, 269 N.C. 759, 760, 153 S.E. 2d 489, 490 (1967). Appellant would have us distinguish the *Cotton* case, which affirmed an order for partition by sale under similar facts, asserting that in the instant case there was no other evidence to support Judge Riddle's conclusions that some or all of the cotenants would be prejudiced or injured by actual partitioning. This argument flies in the face of the record, as it is apparent from the evidence and the findings of fact that the court's decision was based upon a variety of factors which could constitute substantial injury. The assignment of error is overruled.

[2] Appellant next contends that there was insufficient evidence to support the findings of fact upon which the conclusions were based. Findings of fact made by a trial court are binding on appeal when supported by any competent evidence. The judge has discretion in so determining, and his decision will not be disturbed unless some error of law is apparent. *Brown v. Boger*, 263 N.C. 248, 139 S.E. 2d 577 (1965); *Phillips v. Phillips*, 37 N.C. App. 388, 246 S.E. 2d 41, *disc. rev. denied*, 295 N.C. 647 (1978).

Harris v. Harris

A major factor in Judge Riddle's order was the existence of the deed of trust held by the McCormicks. The court found:

(11) That the Respondents, J.H. McCormick and Mildred C. McCormick, are owners and holders of a purchase money deed of trust dated January 29, 1970, which is recorded in Deeds of Trust Book 293, Page 315, Surry County Registry, which is a lien against the real property described in the Petition. That the deed of trust secured an original indebtedness in the sum of \$107,600.00, payable in annual installments on January 1 of each year, over a term of fourteen years, and the last installment payment is due January 1, 1985; that the deed of trust provides that the indebtedness thereby secured cannot be paid before its due date or maturity; that neither the parties to this proceeding nor the Court can compel the Respondents, McCormick to accept prepayment of the indebtedness secured by their deed of trust without their consent; that if the Court were to order a partition of this property, the McCormick deed of trust would continue to be a valid first lien against the entire property until paid and satisfied in full; that a default on the part of either owner following actual partition could result in a foreclosure sale to the prejudice of all such owners.

A certified copy of the deed of trust was introduced into evidence, along with testimony regarding the same, supporting the initial portion of the finding. The remainder of the judge's finding is simply judicial notice of the legal effect that the deed of trust has on the property. *See* 1 Stansbury, *supra*, §§ 11,12. Appellant contends that this finding is irrelevant and fallacious, arguing in her brief that the lien previously "has been treated as completely insignificant and has taken care of itself without the need for any discussion among the co-tenants." We consider this argument spurious in light of Cleve Harris's testimony that he had been making all the annual payments himself as long as he had been managing the property.

Likewise, we find that the other findings of fact, dealing with the effects of the dissimilarity of the nature, location and condition of the tracts, the lack of balance among its uses, and the presence of a cemetery and access road on one tract, in

Harris v. Harris

addition to the previously discussed tobacco allotment, are all supported by competent evidence in the record.

We note that several of the findings of fact are essentially conclusions of law and will be treated as such on appeal. *Britt v. Britt*, 49 N.C. App. 463, 271 S.E. 2d 921 (1980); *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E. 2d 375 (1978).

[3] Appellant takes issue with the court's usage of the term "prejudice" rather than "injury" in determining that the land should be sold rather than partitioned in kind. The general principles applicable to partitioning proceedings are detailed in *Brown, supra*, and are summarized in *Phillips, supra* at 390-91, 246 S.E. 2d at 43, as follows:

A tenant in common is entitled, as a matter of right, to a partition in kind if it can be accomplished equitably. That is to say, partitioned in kind is favored over sale of the land for division, and the burden is upon those opposing a partition in kind to establish the necessity of a sale. G.S. 46-22 allows the court to order a sale where it is proven that actual partition cannot be had without injury to some or all of the cotenants. Injury to a cotenant means "substantial injustice or material impairment of his rights or position, such that it would be unconscionable to require him to submit to actual partition." The test of such injury is whether the value of each cotenant's share upon actual partition would be *materially less* than the monetary share of each that could probably be obtained from a sale of the whole. Whether there should be a partition in kind or a partition by sale is to be determined on the facts of each case. [Emphasis in original.]

In *Brown, supra* at 256-57, 139 S.E. 2d at 583, we find:

A sale will not be ordered merely for the convenience of one of the cotenants. . . . The physical difficulty of division is only a circumstance for the consideration of the court. . . . On the question of partition or sale the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. 68 C.J.S., Partition, § 127, p. 193. "The test of whether a partition in kind would result in *great prejudice* to the cotenant owners is whether the value of the share of each in case of a parti-

State v. Cornell

tion would be *materially less* than the share of each in the money equivalent that could probably be obtained for the whole.” (Emphasis added). 4 Thompson on Real Property, § 1828, p. 309. But many considerations, other than monetary, attach to the ownership of land. *Hale v. Thacker*, 12 S.E. 2d 524 (W. Va. 1940). No exact rule is possible of formulation to determine the question whether there should be a partition in kind or a partition by sale. The determination must be made on the facts of the particular case.

Under the above standards, we find that the facts of this case support Judge Riddle’s order. We cannot agree with appellant’s assertion in her brief that “ ‘prejudice’ is tantamount to ‘inconvenience’ and is not a consideration valid in and of itself to order by [*sic*] a partition by sale.” Webster’s Third New International Dictionary 1788 (1971) defines prejudice in terms of injury or damage. Additionally, finding of fact 6, technically a conclusion of law, states that division of the property cannot be made without “substantial injury” to some or all of the co-owners. We find no substantial legal distinction and no error in Judge Riddle’s usage of the term “prejudice.”

Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. ROY DALE CORNELL

No. 8024SC828

(Filed 3 March 1981)

1. Criminal Law § 91– no denial of speedy trial

There was no merit to defendant’s contention that the trial court erred in denying his motion to dismiss for failure to provide a speedy trial where defendant was indicted on 4 September 1979; defendant voluntarily made himself unavailable for trial at the 17 December 1979 session of court; the next session of criminal court scheduled in that county commenced on 7 January 1980; on 8 January 1980 defendant filed *pro se* a motion “for a speedy trial”; the period between 17 December 1979 and 7 January 1980 was properly excluded by the trial court as a “period of delay resulting from the absence or unavailability of defendant”; with this exclusion, the requisite 120 days had not elapsed when defendant filed his 8 January 1980 motion, and therefore the applicable time limit specified by G.S. 15A-701 had not expired; and

State v. Cornell

because a motion for prompt trial under G.S. 15A-702 is appropriate only when the applicable time limit specified by G.S. 15A-701 has not been met, and because, as a result of the exclusion of the period of delay resulting from the absence of defendant, the applicable time limit had been met, the trial court correctly concluded that defendant's motion could not be treated as a motion for prompt trial under G.S. 15A-702.

2. Larceny § 9— acquittal of breaking or entering – verdict of guilty of felonious larceny improper

Where defendant was acquitted of felonious breaking or entering, he could not be convicted of felonious larceny based on the felonious breaking or entering charge, and the jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny.

APPEAL by defendant from *Ervin, Judge*. Judgment entered 28 March 1980 in Superior Court, WATAUGA County. Heard in the Court of Appeals 14 January 1981.

Defendant was indicted for the felonious breaking or entering of a building and felonious larceny after breaking or entering. The jury returned verdicts of not guilty of felonious breaking or entering, and guilty of felonious larceny after breaking or entering.

From a judgment of imprisonment for not less than ten years nor more than ten years, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Robert A. Bell for defendant appellant.

WHICHARD, Judge.

[1] Defendant first contends the trial court erred "in denying [his] motion to dismiss for failure to provide a speedy trial." A defendant in a criminal case has the burden of proof in supporting a motion to dismiss for failure to comply with the time limits for commencement of trial imposed by G.S. 15A-701. G.S. 15A-703 (1978). The State, however, has "the burden of going forward with evidence in connection with excluding periods from computation of time" in determining whether the applicable time limitations have been complied with. *Id.*

The defendant here presented, at the hearing on his motion to dismiss for failure to comply with the Speedy Trial Act, evidence tending to show the following: He was indicted on 4

State v. Cornell

September 1979. On 8 January 1980 he filed, *pro se*, a motion “for a speedy trial.” His trial commenced 26 March 1980, considerably beyond the 120 day limit from the time of indictment imposed by G.S. 15A-701(a1)(1).¹

The State offered evidence, stipulations, or argument in response tending to show the following: Defendant was indicted on 4 September 1979 in this and two other cases. Between defendant’s indictment and the session at which he was tried, three criminal sessions of Superior Court were held in Watauga County. These sessions commenced on 17 December 1979, 7 January 1980 and 11 February 1980. Defendant’s cases were calendared for the 17 December 1979 session, but defendant failed to appear. The trial of one of the other cases against defendant at the 7 January 1980 session resulted in a mistrial. One of the cases against defendant was calendared and tried at the 11 February 1980 term. The other two cases, including this one, were also calendared; but the trial court entered an order finding they could not be heard, and therefore continued them. After appropriate exclusions from computation were made, a period of 122 days had elapsed since indictment of defendant.

The trial court, after finding facts, concluded that Watauga is a county with a “limited number of court sessions” within the meaning of that phrase as used in G.S. 15A-702; and that, consequently, the State was not required to try defendant within 120 days.² It further found that defendant’s motion was “not a motion for a prompt trial within the meaning of G.S. 15A-702” and concluded that the defendant had never made a “demand for a prompt trial within the meaning of G.S. 15A-702 and that the Court had no obligation in the absence of such a demand to schedule his case for trial in any county other than Watauga County.”

¹G.S. 15A-701(a1)(1) applies to the trial of a defendant “who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1980.” Defendant here was indicted 4 September 1979.

²G.S. 15A-701(b)(8) provides for exclusion in computing the time within which the trial of a criminal case must begin of “[a]ny period of delay occasioned by the venue of the defendant’s case being within a county where due to limited number of court sessions scheduled for the county, the time limitations of [G.S. 15A-701] cannot reasonably be met.”

State v. Cornell

Defendant does not contend the court erred in finding that Watauga is a county with limited court sessions. On the contrary, his brief states: "In passing we note that Watauga County is one of those counties for whose purposes NCGS 15A-702 was designated." He appears to contend, however, that his 8 January 1980 motion was "a motion for prompt trial" pursuant to G.S. 15A-702. The ground for this contention is that in the motion he did request that he be brought to trial as soon as possible. G.S. 15A-702 provides that if the venue of a defendant's case is in a county where due to the limited number of court sessions "the applicable time limit specified by G.S. 15A-701 has not been met," the defendant may file a motion for prompt trial. The court may then order the case brought to trial within not less than 30 days, and defendant by filing the motion "accepts venue anywhere within the judicial district."

In *State v. Rogers*, 49 N.C. App. 337, 341, 271 S.E. 2d 535, 538 (1980), we suggested "that trial courts hereafter in determining exclusionary periods under the Speedy Trial Act detail for the record findings of fact and conclusions of law . . ." The findings of fact and conclusions of law here do not adequately detail the factual basis for the trial court's conclusion that the defendant "never made a demand for a prompt trial within the meaning of G.S. 15A-702." The evidence in the record nevertheless supports the conclusion.

Between defendant's 4 September 1979 indictment and the filing of his 8 January 1980 motion, a period of 126 days elapsed. Nothing else appearing, "the applicable time limit specified by G.S. 15A-701 [(120 days)] ha[d] not been met." Defendant had, however, voluntarily made himself unavailable for trial at the 17 December 1979 session. The next session of criminal court scheduled in Watauga County commenced 7 January 1980. The period between 17 December 1979 and 7 January 1980 was thus properly excluded as a "period of delay resulting from the absence or unavailability of the defendant." G.S. 15A-701(b)(3) (Supp. 1979). With this exclusion, the requisite 120 days had not elapsed when defendant filed his 8 January 1980 motion. When the motion was filed, therefore, the applicable time limit specified by G.S. 15A-701 had not expired. Because a motion for prompt trial under G.S. 15A-702 is appropriate only when "the applicable time limit specified by G.S. 15A-701 has not been met," and because, as a result of the exclusion of the period of

State v. Cornell

delay resulting from the "absence or unavailability of the defendant," the applicable time limit had been met here, the trial court correctly concluded that defendant's motion could not be treated as a motion for prompt trial under G.S. 15A-702. Defendant's assignment of error to the denial of his motion is thus overruled.

[2] Defendant next contends the court erred in allowing verdicts which were inconsistent. The jury returned verdicts of not guilty as to the breaking or entering count and guilty as to the felonious larceny count.

Our courts have repeatedly held that where a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen; the jury having to find that the value of the property taken exceeds \$200.00 for the larceny to be felonious.

State v. Keeter, 35 N.C. App. 574, 575, 241 S.E. 2d 708, 709 (1978), and cases cited.³ The indictment here stated the value of the property wrongfully taken as one hundred ninety dollars. No evidence as to the value of the property was adduced at trial. The court did not instruct the jury as to the duty to fix the value of the property and did not submit an issue of misdemeanor larceny.

It is the rule in this jurisdiction that "if the jury does not find the defendant guilty of felonious breaking or entering, it cannot find him guilty of felonious larceny based on the charge of felonious breaking or entering." *Keeter*, 35 N.C. App. at 575, 241 S.E. 2d at 709. Thus the defendant here, having been acquitted of felonious breaking or entering, could not be convicted of felonious larceny based on the felonious breaking or entering charge; and the judgment of felonious larceny must be vacated. It is also the rule that "although the judgment of felonious

³G.S. 14-72 has been amended to increase the value which the stolen property must exceed to constitute a felony from \$200.00 to \$400.00, effective 1 January 1980. 1979 Session Laws, ch. 408. Because the offense committed by defendant occurred on or about 11 May 1979, the \$200.00 figure applies to this case.

State v. Clements

larceny must be vacated where no instructions were given on value, the verdict will stand, and the case is to be remanded for entering a sentence consistent with a verdict of guilty of misdemeanor larceny." *Keeter*, 35 N.C. App. at 575, 241 S.E. 2d at 709.

We therefore vacate the judgment and remand the case to the trial court for entry of a judgment as upon a verdict of guilty of misdemeanor larceny.

Vacated and remanded.

Judges WEBB and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. TINY TOM CLEMENTS

No. 8020SC903

(Filed 3 March 1981)

1. Indictment and Warrant § 12.2— amendment of warrant

In a trial *de novo* in the superior court upon a warrant alleging death by vehicle, the trial court did not err in allowing the State to amend the warrant at the close of the State's evidence by striking an allegation of "following too closely" and adding an allegation of "failure to reduce speed to avoid an accident, a violation of G.S. 20-141(m)," since the nature of the offense with which defendant was charged, death by vehicle, was not changed by the amendment. G.S. 15A-922(f).

2. Automobiles § 113.1— death by vehicle — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for death by vehicle while failing to reduce speed to avoid an accident where it tended to show two vehicles were stopped in an intersection in defendant's lane of travel waiting to make a left turn at the bottom of a long sloping hill; signs warning of the intersection were located 300 feet from the intersection near the crest of the hill; visibility was unimpaired and vehicles coming over the crest of the hill had ample opportunity to see vehicles in the intersection waiting to turn and ample opportunity to stop behind such vehicles; the vehicle in which the deceased was riding came over the crest of the hill and was slowing down in anticipation of having to stop; a sand truck driven by defendant then came over the crest of the hill and struck the right rear of the vehicle in which deceased was riding, forcing it into the lane of oncoming traffic and precipitating the collision in which deceased was killed; and defendant's truck left tire impressions up to the point of impact of approximately 187 feet in length.

3. Criminal Law § 146.4— constitutional questions not raised in trial court

An appellate court cannot consider questions as to the constitutionality of a statute which have not been raised or considered in the trial court.

State v. Clements

APPEAL by defendant from *Collier, Judge*. Judgment entered 3 June 1980 in Superior Court, ANSON County. Heard in the Court of Appeals 5 February 1981.

Defendant was charged in a proper warrant with exceeding a safe speed in violation of G.S. § 20-141(a) and following too closely in violation of G.S. § 20-152(a). Defendant was also charged in a proper warrant with death by vehicle while following too closely, in violation of G.S. § 20-141.4. Defendant was first tried in the District Court and was found guilty of all charges on 9 April 1980, and he appealed to the Superior Court for a trial de novo.

In the Superior Court, the State offered evidence tending to show the following: On 7 January 1980, at approximately 5:30 p.m., Daniel Lee McRae was operating a white 1967 Ford pickup truck traveling eastbound on U.S. Highway 74 east of Wadesboro, North Carolina. McRae had one passenger, John Carelock. The weather was "overcast, cloudy" but "the highway was dry, visibility was clear," and "it was light enough" that headlights were not necessary. McRae's vehicle was approaching the intersection of U.S. 74 and Rural Paved Road # 1730. U.S. 74 in that area is a "straight" road, and goes up a long but "not steep" slope in each direction from the intersection. Signs indicating the intersection were located on both sides of the eastbound lane of U.S. 74 approximately 300 feet from the intersection near the crest of a hill. Although the eastbound lane was normally two lanes wide, only one lane was open at the time due to road construction.

As McRae's vehicle came over the hill past the signs and approached the intersection McRae observed two vehicles headed in the same direction that were stopped in the lane of travel waiting to make a left turn off of U.S. 74 onto Rural Paved Road # 1730. The westbound lane approaching the intersection was "covered [with traffic] all the way back over the other hill." McRae slowed his vehicle to about 35 m.p.h., anticipating that he would have to stop. Then McRae "heard something," looked in his rear-view mirror, and saw that "a big radiator done hit in the back." McRae "went in the air" and could not remember what happened thereafter.

Henry Allen Snuggs, the driver of one of the vehicles stopped in the eastbound lane of U.S. 74 at the intersection, had

State v. Clements

seen McRae's truck come over the crest of the hill moments earlier and thereafter had seen a sand truck, driven by defendant, coming behind McRae's truck. Snuggs noticed that the truck being driven by McRae was reducing speed, and then Snuggs "looked again and Mr. McRae's truck was still slowing down" and the sand truck driven by defendant was "right on his [McRae's] bumper." The sand truck then hit McRae's truck on the rear right-hand side, and McRae's truck went off to the left, into the westbound lane and the path of oncoming traffic. McRae's truck was hit by a "ten-wheeler" truck, and Carelock was killed as a result of the collision.

When O.W. Tant, a state trooper, arrived at the scene he observed that McRae's pickup truck was "totally demolished." Tant then had a conversation with defendant and the driver of the westbound truck, and after defendant was advised of his rights, he told the officer he had been following McRae's truck for approximately two miles. Tant then observed a set of tire impressions matching the tires on the sand truck driven by defendant in the eastbound lane of U.S. 74 approximately 187 feet in length ending at the "point of impact." According to the testimony of Tant, the "point of impact" was 110 feet from the intersection.

At the close of the State's evidence, defendant moved to dismiss the charges of following too closely and driving at an excessive speed. The State moved to amend the warrant alleging death by vehicle to strike the following too closely allegation and to allege "failure to reduce speed to avoid an accident, a violation of G.S. 20-141(m)." The court granted these motions. Defendant offered no evidence. The jury found defendant guilty as charged in the amended warrant, and from a judgment imposing a prison sentence of eighteen months, which was suspended, and a fine of \$300, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

E.A. Hightower and H.P. Taylor, Jr., for the defendant appellant.

HEDRICK, Judge.

[1] Defendant first assigns error to the court's allowing the State to amend the warrant alleging death by vehicle to strike

State v. Clements

the portion alleging following too closely and to add an allegation of "failure to reduce speed to avoid an accident, a violation of G.S. 20-141(m)." Defendant argues that the amendment "changed the nature of the offense charged" and thus defendant was "prejudiced" by having to defend himself on two charges throughout the trial only to have the case submitted to the jury on a third charge. We disagree.

G.S. § 15A-922(f) provides: "A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged." This statute conforms to the long-held principle in this State that an amendment to a warrant under which a defendant is charged is permissible as long as the amended warrant does not charge the defendant with a different offense. *See, e.g., State v. Wilson*, 237 N.C. 746, 75 S.E. 2d 924 (1953); *State v. Hunt*, 197 N.C. 707, 150 S.E. 353 (1929).

G.S. § 20-141.4 in pertinent part provides:

(a) Whoever shall unintentionally cause the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of death by vehicle when such violation is the proximate cause of said death.

In the present case, the record discloses that defendant was originally charged in a proper warrant with death by vehicle in violation of G.S. § 20-141.4. The record also shows that the case was submitted to the jury on the death by vehicle charge. Although the amendment allowed by the court replaced the language "following too closely" with the wording "failure to reduce speed to avoid an accident, a violation of G.S. 20-141(m)," defendant was still charged with unintentionally causing the death of John Carelock while violating a state statute or local ordinance pertaining to the operation of motor vehicles, when such violation was the proximate cause of Carelock's death. Although the death by vehicle statute contemplates that some violation of a motor vehicle statute or ordinance be specified in a warrant charging death by vehicle, it is not essential that the motor vehicle violation alleged in the warrant as originally issued be the same as the motor vehicle violation alleged in the

State v. Clements

warrant as considered by the jury where, as here, the substituted motor vehicle violation is substantially similar to that originally alleged. The nature of the offense with which defendant was charged, death by vehicle, was not changed simply by striking the allegation of following too closely (a violation of G.S. § 20-152) and substituting therefore "failure to reduce speed to avoid an accident, a violation of G.S. 20-141(m)." This assignment of error is without merit.

[2] By his second assignment of error, defendant contends that the court erred in denying his motion to dismiss the charge of death by vehicle as alleged in the amended warrant. We do not agree. In ruling upon a defendant's motion to dismiss, the trial court is required to interpret the evidence in the light most favorable to the State, and all reasonable inferences favorable to the State must be drawn therefrom. *State v. Fletcher*, — N.C. —, 272 S.E. 2d 859 (1981); *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980).

Considering the evidence in the present case in the light most favorable to the State, the evidence tends to show that the intersection at which vehicles were stopped in the lane of travel waiting to turn left was at the bottom of a long sloping hill, and signs warning of the intersection were located 300 feet from the intersection near the crest of the hill. The evidence also tends to show that visibility was unimpaired, such that vehicles coming over the crest of the hill would have ample time to see those vehicles stopped at the intersection waiting to turn, and would have ample distance to slow down in anticipation of having to stop behind the vehicles waiting to turn. In addition, the evidence tends to show that the vehicle in which John Carelock was riding had come over the crest and was in fact slowing down in anticipation of having to stop. The evidence further tends to show that the sand truck driven by defendant came over the crest of the hill sometime after the vehicle in which Carelock was a passenger, and defendant's truck then hit the right rear of the vehicle in which Carelock was riding, forcing it into the lane of oncoming traffic and precipitating the collision in which Carelock was killed. Moreover, the evidence tends to show that defendant's truck left tire impressions up to the point of "impact" of approximately 187 feet in length. In our opinion, the evidence is sufficient to raise the reasonable inferences that defendant failed to reduce his speed in order to avoid a collision

State v. Cherry

with the vehicle in which Carelock was a passenger, and that this failure proximately caused Carelock's death. The trial judge therefore properly denied defendant's motion to dismiss and this assignment of error is without merit.

[3] Finally, defendant contends that G.S. § 20-141 (m), which makes failure to reduce speed to avoid an accident a violation of the State's motor vehicle law, and G.S. § 15A-922(f), the amendment statute previously discussed, are unconstitutional. We will not consider defendant's arguments. It is well settled in this State that the appellate court cannot consider questions raised as to the constitutionality of a statute that have not been raised or considered in the trial court. *City of Durham v. Manson*, 285 N.C. 741, 208 S.E. 2d 662 (1974); *Wilcox v. North Carolina State Highway Commission*, 279 N.C. 185, 181 S.E. 2d 435 (1971); *Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. App. 206, 262 S.E. 2d 860, *disc. rev. denied*, 300 N.C. 198, 269 S.E. 2d 624 (1980). The record in the present case indicates that defendant did not move to quash the warrant charging him with death by vehicle after the amendment of the warrant, nor did defendant move to arrest the judgment. Indeed, the record fails to disclose that a question as to the constitutionality of either G.S. § 20-141(m) or G.S. § 15A-922(f) was ever mentioned while the trial court was vested with jurisdiction, and thus the constitutional questions are not properly before us.

We hold that defendant had a fair trial free from prejudicial error.

No error.

Judges MARTIN (Robert M.) and CLARK concur.

STATE OF NORTH CAROLINA v. RICKY MANFORD CHERRY

No. 802SC945

(Filed 3 March 1981)

1. **Homicide § 21.9—gun discharged into mobile home – sufficiency of evidence of involuntary manslaughter**

Evidence was sufficient to require submission of involuntary manslaughter to the jury where it tended to show that defendant pointed a rifle at a mobile home and it discharged, killing an occupant therein.

State v. Cherry

2. Homicide § 27.2– involuntary manslaughter – instructions sufficient

There was no merit to defendant's contention that the court gave confusing instructions on involuntary manslaughter where the court charged the jury that the State must prove that defendant's act was criminally negligent and that such act proximately caused the victim's death; the court then instructed that, if the jury did not so find or had a reasonable doubt, it would be their duty to return a verdict of not guilty; the court did not err in omitting that the jury need only have a reasonable doubt "as to one or both" of these elements; defendant had judicially stipulated that the bullet, fired from the rifle in his hands, struck the victim in the forehead, causing his death, thereby dispensing with the proximate cause issue; and when the jury returned to seek further instructions, the court included the phrase "as to one or more of these things," thereby clarifying any potential confusion arising from its original charge.

3. Homicide § 28.8– death by accident or misadventure – improper instructions

The trial court in a homicide prosecution erred in its instructions on death by accident or misadventure since the court's use of the phrase, "he was using proper precautions to avoid danger," allowed the jury to eliminate death by accident upon a finding that defendant was negligent in the handling of the weapon, the correct rule being that defendant must have been criminally or culpably negligent in the handling of the weapon in order to lose the defense of accidental killing.

APPEAL by defendant from *Brown, Judge*. Judgment entered 24 July 1980 in Superior Court, MARTIN County. Heard in the Court of Appeals 11 February 1981.

Defendant was indicted for murder in the first degree. At trial, the court also submitted to the jury the lesser included offenses of murder in the second degree and involuntary manslaughter.

The evidence disclosed that on 4 January 1980 defendant and David Edmondson had been together most of the day on Edmondson's boat and in his home. They were drinking intoxicating liquors during the day. Later that evening, defendant drove his car to Bobby Wynne's home to get some "hash." Edmondson rode in the right front seat and George Miller and Richard Cunningham were in the back seat. Edmondson had a .22-caliber pistol in his boot, and he placed a loaded 30-30 caliber rifle between himself and defendant, with the barrel on the floor of the car. A bullet was in the chamber, with the hammer forward. Defendant parked the car parallel to the Wynne trailer, with the passenger side of the car closest to the trailer.

State v. Cherry

Edmondson got out of the car and went into the trailer. Defendant and the other two men remained in the car. While in the trailer Edmondson heard a shot and saw Wynne lying in a puddle of blood. Edmondson pulled his pistol and fired back toward the door of the trailer. He left but defendant's car was gone, so he went toward highway 64. As he neared the highway, defendant came up, stopped his car, and Edmondson got in.

George Miller testified:

While Edmondson was in the trailer, I had no conversation with Cherry other than asking him for a cigarette but he didn't have but one. A few seconds later, I said "I wonder what's holding Nasi-Boy up" and then Ricky Cherry said "I'll fix him" and reached over and picked up the rifle and started raising it up and I said "man, what in the hell you doing?" I said that to him because he looked like he was getting ready to shoot it and I say that because any time you are sitting there and a man picks up a rifle and starts pointing it, you know he's going to mess up.

He was pointing it toward Bobby Wynne's trailer. Not hardly any time, maybe a second, two seconds, passed between this statement that he made and the time he picked up the gun. When I made the statement "what the hell are you doing?" the gun went off and at that time the gun was pointed out the side window toward Bobby Wynne's trailer. After it went off I heard another shot inside the trailer go off so I said "Man, let's get the hell out of here." Cherry said nothing but pulled off and pulled up at Randy Pierce's trailer and Cunningham and I got out. . . . With respect to the manner in which Cherry was holding the gun, he leaned over like that and picked it up and twisted around in his seat, like this and shot.

.

. . . [H]e was holding the gun to shoot it.

Defendant testified that Edmondson had fired the gun earlier that night and that when he (defendant) had the gun, it discharged accidentally.

The jury returned a verdict of guilty of involuntary manslaughter.

State v. Cherry

Attorney General Edmisten, by Associate Attorney Lisa Shepherd, for the State.

Gaylord, Singleton & McNally, by L.W. Gaylord, Jr., and Gurganus & Bowen, by Edgar J. Gurganus, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant argues that the evidence did not support submitting the charge of involuntary manslaughter to the jury. We do not so hold. In *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977), we find:

Involuntary manslaughter has been defined as the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty.

Id. at 702, 231 S.E. 2d at 606. In such case, the state must prove that the killing was proximately caused by the defendant's culpably negligent act.

Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others. As is stated in 1 Wharton, Criminal Law and Procedure, § 291 at 613 (1957), "There must be negligence of a gross and flagrant character, evincing reckless disregard of human life. . . ."

Id.

The evidence set out above clearly supports submission of involuntary manslaughter to the jury. See *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). On this charge, the state does not have to prove that defendant intentionally discharged the

State v. Cherry

weapon. It is sufficient if he recklessly pointed the gun at the mobile home and it discharged, killing Wynne. *See State v. Boldin*, 227 N.C. 594, 42 S.E. 2d 897 (1947). The assignment of error is overruled.

[2] Defendant contends the court gave confusing instructions on involuntary manslaughter. After charging the jury that the state must prove two things, that defendant's act was criminally negligent and that such act proximately caused the victim's death, the court continued: "However, if you do not so find or have a reasonable doubt, it would be your duty to return a verdict of not guilty." Defendant argues that the court erred in omitting that the jury need only have a reasonable doubt "as to one or both" of these elements. Defendant judicially stipulated that the bullet fired from the rifle in the hands of defendant struck Wynne in the forehead, causing his death. The stipulation was made for the purpose of dispensing with proof of cause of death, and the state did not present any medical evidence as to this fact question. Such a stipulation is a judicial admission of the fact stipulated and requires no further proof. 2 Stansbury's N.C. Evidence § 171 (Brandis rev. 1973). Having earlier dispensed with the proximate cause issue, it is apparent that the state was required to prove only the criminal negligence element. Additionally, when the jury returned to seek further instructions, the court included the phrase "as to one or more of these things," thereby clarifying any potential confusion arising from the original charge. No prejudicial error appears in that portion of the charge assigned as error.

[3] Last, defendant contends the court erred in its instruction on death by accident or misadventure. The court instructed the jury:

Now, Members of the Jury, bearing in mind that the burden of proof rests upon the State to establish the guilt of Ricky Manford Cherry beyond a reasonable doubt, I charge that, if you find from the evidence that the killing of the deceased was accidental, that is that Robert Warren Wynne's death was brought about by an unusual or unexpected event from a known cause, and you also find that the killing of the deceased was unintentional, that at the time of the homicide the defendant was engaged in the performance of a lawful act without any intention to do harm, and at the

State v. Cherry

time, he was using proper precautions to avoid danger, if you find those to be the facts, remembering that the burden is upon the State, then I charge you that the killing of the deceased by a homicide was a homicide by misadventure and, if you so find, it would be your duty to render a verdict of not guilty as to this defendant.¹

Defendant's argument is that the phrase "he was using proper precautions to avoid danger" allowed the jury to eliminate death by accident upon a finding that defendant was negligent in the handling of the weapon. The correct rule is that defendant must have been *criminally* or *culpably* negligent in the handling of the weapon in order to lose the defense of accidental killing. Defendant's argument has merit and we agree. The Court, in *State v. Earley*, 232 N.C. 717, 62 S.E. 2d 84 (1950), established that where the court so instructs, as in this case, it is error because the defendant's plea of an accidental killing is made unavailable to him upon a finding by the jury that he was merely negligent in the handling of the gun, rather than culpably negligent. The Court in *Earley* further held that the defendant was entitled to have the jury instructed as to the requirement of a finding of culpable negligence in connection with the instructions on defendant's plea that the killing was accidental. *Accord*, *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, 96 A.L.R. 2d 1422, *cert. denied*, 368 U.S. 851 (1961); *State v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768 (1956); *State v. Adams*, 2 N.C. App. 282, 163 S.E. 2d 1 (1968). *See Homicide, Fourth Annual Survey of North Carolina Case Law*, 35 N.C.L. Rev. 177, 213 (1957). Instructions as to the requirement of criminal negligence in other portions of the charge are not sufficient to make the error harmless beyond a reasonable doubt.

¹The charge was taken from the Pattern Jury Instructions, N.C.P.I. — Crim. 307.10, the pertinent part being:

I charge you that if you find from this evidence that the killing of the deceased was accidental, that is, that (*name victim*)'s death was brought about by an unknown cause or that it was from an unusual or unexpected event from a known cause, and you also find that the killing of the deceased was unintentional, that at the time of the homicide the defendant was engaged in the performance of a lawful act without any intention to do harm and that at the time he was using proper precautions to avoid danger, if you find these to be the facts, remembering that the burden is upon the State, then I charge you that the killing of the deceased was a homicide by misadventure and if you so find, it would be your duty to render a verdict of not guilty as to this defendant.

Whitfield v. Wakefield

For this error in the charge, there must be a
New trial.

Judges CLARK and ARNOLD concur.

PAUL L. WHITFIELD v. WALTER WAKEFIELD, D/B/A THE OLD BOOK
STORE

No. 8026DC710

(Filed 3 March 1981)

1. Courts §9.6; Rules of Civil Procedure § 60—motion to set aside default judgment – appearance by defendant – prior ruling by another judge

In ruling on a Rule 60(b)(6) motion to set aside a default judgment, the trial court had no authority to determine whether defendant had made an appearance in the case where the trial court which entered the default judgment had previously ruled that defendant had made no appearance.

2. Rules of Civil Procedure § 60.2— motion for relief from default judgment – failure to give written notice of application for default

The trial court had no authority under Rule 60(b)(6) to set aside a default judgment against a nonresident defendant who was properly served with process by registered letter on the ground that a letter sent to plaintiff by defendant constituted an appearance and defendant received no written notice of plaintiff's application for judgment by default as required by Rule 55(b)(2).

APPEAL by plaintiff from *Lanning, Judge*. Order entered 6 May 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 February 1981.

This is a civil action wherein plaintiff seeks damages arising out of plaintiff's purchase of certain antique books from defendant. Plaintiff filed a verified complaint on 30 November 1977 in which plaintiff prayed that he have and recover a total of \$2,500 in damages from defendant. In accordance with Rule 4(j)(9)b of the North Carolina Rules of Civil Procedure, plaintiff sent a summons and a copy of his complaint by registered mail to defendant, a resident of New Hampshire. The summons and complaint were received by defendant on 14 December 1977. Plaintiff then received from defendant a letter dated 14 December 1977 acknowledging the receipt of "your 'civil summons'" and stating that plaintiff's contentions "do not constitute any-

Whitfield v. Wakefield

thing except rhetoric." The letter further provided that "[i]f I do hire an attorney to present in your local court a case, certainly he will have these contradictory statements of yours & supporting evidence, as well as a docier [sic]" and that "[o]ur lawyer thought your 'civil summons' highly laughable & a disgrace."

Upon plaintiff's request, the assistant clerk of Mecklenburg County Superior Court made an entry of default on 20 January 1978. Plaintiff moved for judgment by default, and after a hearing in the District Court on 27 January 1978, Judge Cantrell made the following pertinent findings of fact:

1. That this was an action instituted by the filing of Summons and Complaint on November 30, 1977.

2. That a copy of the Summons and Complaint were duly served on the defendant pursuant to the provisions of North Carolina General Statute 1A-1, Rule 4(j)(9)b, and that a copy of the Summons and Complaint were, in fact, received by the defendant on December 14, 1977.

3. That the defendant has filed no responsive pleadings, has requested no extension of time, and has otherwise failed to appear in the cause, and entry of default herein was entered by the Clerk of of the District Court for Mecklenburg County on the ____ day of January, 1978.

4. That this Court has jurisdiction of the subject matter and of the defendant.

. . .

Based on these findings, the court concluded that plaintiff was entitled to entry of default and judgment by default and on 31 January 1978 entered a default judgment awarding plaintiff damages in the sum of \$2,000 and costs.

Some nineteen months later, on 10 September 1979, defendant made a motion to set aside the default judgment entered 31 January 1978 "for the reason that defendant appeared on the case by way of correspondence sent to the plaintiff on December 14, 1977, which referred to the Summons and Complaint which responded to the allegations and gave reasons for the denial of plaintiff's claim." Defendant also alleged in his motion that this correspondence constituted an "answer" and that plaintiff did

Whitfield v. Wakefield

not advice defendant of the hearing on the entry of default and the default judgment prior to the time of the hearing. Defendant further averred a "good and meritorious defense" and submitted a "proposed Answer of Defendant."

After a hearing in the District Court on defendant's motion, Judge Lanning made the following pertinent findings of fact:

1. The motion is made within a reasonable time of the entry of default judgment.

. . . .

4. The defendant was personally served in this matter by registered mail on or about December 14, 1977.

5. On or about December 14, 1977, as a result of the service of the Complaint the defendant mailed a letter to the plaintiff which was received by the plaintiff and was presented by plaintiff to the court at the hearing of plaintiff's motion for default judgment on January 31, 1978.

6. The contents of the letter are not an answer to plaintiff's Complaint, but the letter, mailed to and received by plaintiff, is an appearance by defendant in the action.

7. The defendant did not receive any written notice of the hearing of the motion for entry of default judgment.

Based on these findings, Judge Lanning concluded:

1. The defendant's letter of December 14, 1977 constituted an appearance in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. The contents of the letter do not constitute an answer to the plaintiff's Complaint.

2. Defendant received no written notice of the application of plaintiff for judgment as required by Rule 55(b)(2) of the North Carolina Rules of Civil Procedure.

3. The entry of default judgment should be set aside in accordance with the provisions of Rule 60(b) of the North Carolina Rules of Civil Procedure.

From the order of Judge Lanning that the default judgment be set aside, plaintiff appealed.

Rodney W. Seaford, for the plaintiff appellant.

Whitfield v. Wakefield

Weinstein, Sturges, Odom, Groves, Bigger, Jones & Campbell, by Allen W. Singer and William H. Sturges, for the defendant appellee.

HEDRICK, Judge.

We note at the outset that defendant's motion, dated 10 September 1979, "to set aside the default and Default Judgment entered herein on January 31, 1978 . . ." does not contain the rule pursuant to which the motion was made as contemplated by Rule 6 of the General Rules of Practice for the Superior and District Courts; nevertheless, the trial judge purported to set aside the *final judgment* entered on 31 January 1978 pursuant to Rule 60(b). Obviously, subsections (1-5) of Rule 60(b) have no application in this case. Therefore, we must assume that the trial judge purported to set the 31 January 1978 judgment aside pursuant to Rule 60(b)(6).

[1] Plaintiff in his brief argues that "it was inappropriate for Judge Lanning to rule upon the question of the defendant's appearance," since the original trial judge, Judge Cantrell, had considered this question and in the 31 January 1978 judgment had made a finding of fact with respect to that question as follows:

3. That the defendant has filed no responsive pleadings, has requested no extension of time, and has otherwise failed to appear in the cause, . . .

We agree. Motions under Rule 60(b)(6) cannot be used as a substitute for appellate review. *O'Neill v. Southern National Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979); *Waters v. Qualified Personnel, Inc.*, 32 N.C. App. 548, 233 S.E. 2d 76 (1977), *rev'd on other grounds*, 294 N.C. 200, 240 S.E. 2d 338 (1978). Judge Lanning's finding that the letter sent from defendant to plaintiff on or about 14 December 1977 constituted an "appearance," such that defendant was entitled under Rule 55(b)(2) to three days' notice of the hearing on plaintiff's application for a judgment by default, is clearly a reversal of Judge Cantrell's earlier ruling. Assuming arguendo that Judge Cantrell's finding that defendant had made no appearance was erroneous, Judge Lanning, in ruling on defendant's Rule 60(b) motion, had no authority to substitute his own finding regarding defendant's appearance and set aside the default judgment. *Waters v. Qualified*

Whitfield v. Wakefield

Personnel, Inc., supra; Campbell v. First Citizens Bank and Trust Co., 23 N.C. App. 631, 209 S.E. 2d 556 (1974).

[2] Although the trial court has broad equitable power to vacate judgments pursuant to Rule 60(b)(6) whenever such action is appropriate to accomplish justice, the trial court cannot do so without a showing based upon competent evidence that justice requires it, *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *disc. review denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976), and only in extraordinary circumstances, *Standard Equipment Co., Inc. v. Albertson*, 35 N.C. App. 144, 240 S.E. 2d 499 (1978); *Campbell v. First Citizens Bank and Trust Co., supra*. In the present case, defendant made no showing that justice required that Judge Lanning set aside the default judgment entered by Judge Cantrell on 31 January 1978. Judge Lanning's order setting aside the January 1978 judgment solely for what Judge Lanning perceived to be a violation of the technical requirements of Rule 55(b)(2) is of far less significance than defendant's failure to take due notice of the lawful process of the courts when he failed to answer or otherwise appear, and when he merely referred to the summons served upon him as "highly laughable & a disgrace." Certainly, as well, the situation in the present case is not one of the "exceptional circumstances" necessary for the imposition of Rule 60(b)(6) as contemplated in *Standard Equipment Co., Inc. v. Albertson, supra*, and *Campbell v. First Citizens Bank and Trust Co., supra*.

We therefore conclude that Judge Lanning had no authority to set aside the judgment by default.

The order setting aside the judgment dated 31 January 1978 is vacated and the cause is remanded to the District Court for the entry of an order reinstating the 31 January 1978 judgment of Judge Cantrell.

Vacated and remanded.

Judges WEBB and HILL concur.

Duffer v. Dodge, Inc.

JAMES DUFFER AND GERALDINE SEARS DUFFER v. ROYAL DODGE, INC.

No. 8012DC723

(Filed 3 March 1981)

1. Appeal and Error § 68.2– dismissal of negligence claim – law of the case

The dismissal at the first trial of plaintiffs' claims for personal injuries and damages to their car based on negligence became the law of the case and binding upon the court at the second trial where plaintiffs did not bring forward or argue an assignment of error based upon the dismissal of their negligence claims in their appeal from the first trial, and the appellate court held that such assignment of error was abandoned by plaintiffs.

2. Automobiles § 6.5– sale of automobile – incorrect odometer reading – action for damages – sufficiency of evidence

Plaintiffs' evidence was sufficient for the jury in an action to recover damages pursuant to the Vehicle Mileage Act, G.S. 20-340 *et seq.*, where it was sufficient to support findings by the jury that defendant dealer sold an automobile to the plaintiffs and furnished them, at the time of the sale, an odometer mileage statement which showed the automobile had been driven 1.4 miles, defendant knew the car had been driven more than 1.4 miles, and defendant failed to make a statement that the mileage was unknown. Furthermore, the prima facie rule established by the 1979 amendment to G.S. 20-343 applied to plaintiffs' case, although the sale of the automobile occurred in 1976, and plaintiffs' evidence was sufficient to present to the jury the question whether defendant violated G.S. 20-343.

APPEAL by plaintiffs from *Cherry, Judge*. Judgment signed 27 February 1980 in District Court, CUMBERLAND County. Heard in the Court of Appeals 11 February 1981.

This is an action which arose out of the purchase of an automobile by the plaintiffs from the defendant. Plaintiffs alleged that the defendant sold an automobile to the plaintiffs and furnished them, at the time of the sale, an odometer mileage statement which showed the automobile had been driven 1.4 miles. Plaintiffs alleged this was a false statement which the defendant knew was false. Plaintiffs alleged that they bought the automobile relying on this false representation, which gave them a claim under the federal Motor Vehicle Information and Cost Savings Act of 1972, 15 U.S.C.A. § 1989 (1974), and the state Vehicle Mileage Act, Article 15 of Chapter 20 of the General Statutes of North Carolina. Plaintiffs also alleged that defendant was negligent in furnishing them an automobile which had a defect in the steering mechanism, caus-

Duffer v. Dodge, Inc.

ing the vehicle to have an accident, damaging it, and proximately causing personal injury to the plaintiffs.

At the close of plaintiffs' evidence, the court directed a verdict against the plaintiffs, from which they appeal.

Cooper, Davis & Eaglin, by James M. Cooper, for plaintiff appellants.

Rose, Thorp, Rand & Ray, by Ronald E. Winfrey, for defendant appellee.

MARTIN (Harry C.), Judge.

[1] This is the second time this case has been tried and appealed. In the first trial, plaintiffs' claims for personal injuries and damages to their car based on negligence were dismissed at the close of plaintiffs' evidence. On appeal, plaintiffs did not bring forward or argue an assignment of error based upon the dismissal of their claims of negligence, and this Court held the assignment of error was abandoned by plaintiffs. The dismissal at the first trial thus became the law of the case on that issue, and it is res judicata and binding upon the court in the second trial. *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E. 2d 181 (1974); *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E. 2d 911, cert. denied, 287 N.C. 465 (1975). We hold the trial court did not err in dismissing plaintiffs' claims for damages based upon negligence.

[2] Next, we consider whether the court erred in dismissing plaintiffs' claim based on misrepresentation by defendant as to the odometer reading. On this issue plaintiffs' evidence showed that they bought a Dodge Dart car from defendant for a cash purchase price of \$5,249.50. They soon discovered that the car engine was greasy and dirty and there were nicks or chips in the paint on the car. The testimony of Charles L. Tolar, a dealer in Plymouth, indicated that he had owned the car and sold it to a dealer in Aulander, North Carolina. The car was driven from Plymouth to Aulander, a distance of fifty-five miles. The defendant bought the car from the dealer in Aulander, with the understanding that the Aulander dealer would deliver the car to Kinston. An employee of the Aulander dealer drove the car to Kinston, a distance of about eighty miles. From there, defendant brought the car by truck to Fayetteville.

Duffer v. Dodge, Inc.

Defendant's salesman and agent, Emery Kiser, filled out the disclosure form indicating an odometer reading of 1.4 miles at the time of sale to plaintiffs and delivered a copy to them. Defendant could have indicated on the form that the actual mileage was unknown but did not do so.

Geraldine Duffer, who received the title to the car and the odometer disclosure form, testified that the car had a fair market value of about \$3,900 to \$4,000 at the time of the purchase.

On the motion for directed verdict, the evidence must be considered in the light most favorable to plaintiffs. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Harrington v. Collins*, 40 N.C. App. 530, 253 S.E. 2d 288, *aff'd*, 298 N.C. 535 (1979).

The statute in question requires:

Disclosure requirements. — (a) In connection with the transfer of a motor vehicle, the transferor shall deliver to the transferee . . . a single written statement which contains the following:

(1) The odometer reading at the time of the transfer;

. . . .

(5) A statement that the mileage is unknown if the transferor knows the odometer reading differs from the number of miles the vehicle has actually traveled, and that the difference is greater than that caused by odometer calibration error;

N.C. Gen. Stat. 20-347(a)(1),(5).

The federal cases interpreting the comparable federal statute, 15 U.S.C.A. § § 1981-1991, are instructive. In brief, they hold:

Where a dealer knew of falseness of odometer reading, or recklessly disregarded indications that the reading was false, it knowingly failed to provide statement that actual mileage of vehicle was unknown. *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), *aff'd*, 578 F. 2d 721 (8th Cir. 1978).

"Intent to defraud" in the statute does not require finding of "actual knowledge" of the false odometer reading. *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328 (D. Conn. 1977).

Duffer v. Dodge, Inc.

The intent of the legislature is to impose an affirmative duty on dealers to detect odometer irregularities. *Id.*

Dealer has the duty to state that actual mileage is unknown, even if he lacks actual knowledge that the odometer is incorrect, where in exercise of reasonable care he would have reason to know that the odometer reading is incorrect. *Nieto v. Pence*, 578 F. 2d 640 (5th Cir. 1978).

See also *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W.D. Pa. 1977); *Delay v. Hearn Ford*, 373 F. Supp. 791 (D.S.C. 1974); *Roberts v. Buffaloe*, 43 N.C. App. 368, 258 S.E. 2d 861 (1979).

The evidence is sufficient to support a finding by the jury that defendant knew the odometer reading of 1.4 miles was incorrect. It is uncontradicted that defendant failed to make a statement that the mileage was unknown.

Plaintiffs' evidence is also sufficient to present to the jury the question whether defendant violated section 343 of the act. That section makes it unlawful to disconnect, alter, or reset the odometer with the intent to change the number of miles indicated thereon. In 1979 the following amendment to the statute was enacted:

Whenever evidence shall be presented in any court of the fact that an odometer has been reset or altered to change the number of miles indicated thereon, it shall be prima facie evidence in any court in the State of North Carolina that the resetting or alteration was made by the person, firm or corporation who held title or by law was required to hold title to the vehicle in which the reset or altered odometer was installed at the time of such resetting or alteration

N.C. Gen. Stat. 20-343, 1979 Supp.

The amendment is a procedural statute establishing a prima facie case upon the presentation of the required evidence. It does not alter the substantive law but is solely procedural, not affecting any vested rights of defendant. The Supreme Court in *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598 (1952), was concerned with the following statute:

Duffer v. Dodge, Inc.

“... In all action [*sic*] to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be *prima facie* evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.” [N.C. Gen. Stat. 20-71.1.]

Id. at 245, 72 S.E. 2d at 603.

In holding that the statute was applicable retroactively, the Court stated:

In *Tabor v. Ward*, 83 N.C. 291, the Court declares that laws which change the rules of evidence relate to the remedy only, and are at all times subject to modification and control by the Legislature, and that changes thus made may be applicable to existing causes of action. And it is pertinently stated: “Retrospective laws would certainly be in violation of the spirit of the Constitution if they destroyed or impaired vested right,” but that “one can have no vested right in a rule of evidence when he could have no such right in the remedy,” and that “there is no such thing as a vested right in any particular remedy.”

236 N.C. at 246, 72 S.E. 2d at 604. *See also Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979).

It is true that the statute contains criminal sanctions for its violation, and criminal statutes are to be strictly construed. Nevertheless, the statute also contains civil remedies and is here being applied in a civil case rather than a criminal proceeding. We hold the 1979 amendment is applicable to the case at bar. Furthermore, the evidence is sufficient to overcome the motion for directed verdict without the 1979 amendment.

The trial court’s order dismissing plaintiffs’ claim based upon the alleged violations of Article 15 of Chapter 20 of the General Statutes of North Carolina is

Reversed.

Judges CLARK and ARNOLD concur.

Williams v. Spell

LETTIE LOU WILLIAMS, ADMINISTRATRIX OF THE ESTATE OF WINFRED
SCOTT WILLIAMS v. LAWRENCE SPELL

No. 804SC708

(Filed 3 March 1981)

Automobiles § 89.1— last clear chance — sufficiency of evidence

In an action to recover for the death of plaintiff's intestate who was struck by defendant's pickup truck, evidence was sufficient for the jury to find that deceased, as a result of his contributory negligence, placed himself in a position of helpless peril by walking on the roadway with the flow of traffic, that is, with his back to traffic, and the jury could find that defendant had the means and time to avoid the fatal accident but negligently failed to do so, given the degree of visibility, plaintiff's evidence indicating a lack of oncoming traffic, and defendant's concession that he could have moved either to the left or to the right had he seen deceased.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 25 February 1980 in Superior Court, SAMPSON County. Heard in the Court of Appeals 10 February 1981.

Plaintiff's intestate was struck and killed by a pickup truck driven by defendant at approximately 8:30 p.m. on the night of 30 June 1978. The evidence shows that defendant was traveling in the right-hand lane in a northerly direction and going about 40 m.p.h. The pavement was dry. The sky was getting dark so that defendant had his truck's headlights on. Nevertheless, visibility was good because the sky was clear and the road was straight for a considerable distance in both directions from the scene of the accident. Plaintiff's evidence indicates that defendant's pickup did not leave the right-hand lane prior to impact and that the left lane was clear of any oncoming traffic.

There is no direct evidence of the deceased's location prior to the accident. The evidence does show, however, that the deceased was found in the northbound lane after the accident, two feet from the shoulder, with his head pointing north. The pickup truck was dented on the right-hand side near the headlight. A large gouge mark was found in the pavement, and a red and white colored motor tiller with plow point affixed was found 27 feet north of the body and off to the side of the road. No paint marks were found on the truck. Plaintiff's evidence further showed that the deceased who lived *south* of the accident scene had borrowed the motor tiller earlier during the day from his

Williams v. Spell

brother-in-law who lived *north* of the accident scene and had told his brother-in-law that he would return the motor tiller that day.

The parties stipulated that plaintiff's intestate died as a result of injuries received in the accident and as to the measure of damages. The trial judge submitted to the jury the issues of defendant's negligence, the deceased's contributory negligence and the issue of whether defendant had the "last clear chance to avoid the injury to plaintiff's intestate." The jury answered each issue in the affirmative, and the trial court rendered judgment against defendant in the amount of \$15,000. From such judgment, defendant appeals.

Warrick, Johnson & Parsons, by Dale P. Johnson, for plaintiff appellee.

Warren & Fowler, by Miles B. Fowler, for defendant appellant.

HILL, Judge.

In his first assignment of error, defendant argues that the trial judge erred by submitting the issue of last clear chance to the jury.

Justice Lake, writing in *Exum v. Boyles*, 272 N.C. 567, 575, 158 S.E. 2d 845 (1968), points out that "the doctrine of the last clear chance is not a single rule, but is a series of different rules applicable to differing factual situations." Justice Lake goes on to point out that there is a great deal of confusion about the doctrine, stemming from a failure to observe that every case involves a different factual situation and, therefore, calls into play different rules comprising part of the doctrine. Each case must be considered on its own facts but in every case, in order

to bring into play the doctrine of last clear chance, there must be proof that after the plaintiff [in this case plaintiff's deceased] had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so.

Williams v. Spell

Exum at p. 576.

Defendant concedes the deceased was contributorily negligent and, in fact, contends in his brief that the trial court should have found "plaintiff's intestate guilty of contributory negligence as a matter of law." Defendant further concedes he was negligent in failing to see the deceased, plaintiff's intestate, but argues there is no evidence that his negligent failure was the proximate cause of the accident because there is absolutely no evidence of where deceased was just prior to the accident. Therefore, all we must decide is whether there was enough evidence for the jury to find that the deceased's contributory negligence placed him in a position of helpless peril, whether defendant should have discovered deceased's peril, and whether defendant had the means and time to avoid the injury but negligently failed to do so.

We find that the circumstantial evidence introduced at trial was sufficient for the jury to find that the deceased, as a result of his conceded contributory negligence, placed himself in a position of helpless peril by walking on the roadway with the flow of traffic, that is, with his back to traffic. Finally, the evidence is sufficient for a jury to find that defendant had the means and time to avoid the fatal accident but negligently failed to do so, given the degree of visibility, plaintiff's evidence indicating a lack of oncoming traffic and defendant's concession that he could have moved either to the left or right had he seen the deceased. The issue of last clear chance was properly submitted to the jury. Defendant's assignment of error is without merit and overruled.

Defendant further assigns as error the trial judge's failure to allow his motions for summary judgment, directed verdict and for judgment notwithstanding the verdict. For reasons stated above, these assignments of error are without merit and overruled.

The judgment of the lower court is

Affirmed.

Judges HEDRICK and WEBB concur.

Blue Jeans Corp. v. Pinkerton, Inc.

BLUE JEANS CORPORATION v. PINKERTON, INC.

No. 8013DC690

(Filed 3 March 1981)

Contracts § 27.2; Negligence § 2—security service—failure to report leaky roof—no breach of contract or negligence

In an action to recover damages from leaks in the roof of plaintiff's building due to unusual weather while defendant's guards provided security service for the building, summary judgment was properly entered for defendant where defendant's evidence on motion for summary judgment established the existence of a written contract between the parties which required defendant's guards to be alert and respond only to fire, theft, trespass and vandalism, plaintiff's evidence showed only prior or contemporaneous negotiations which were merged into the written contract, and the evidence thus showed no contractual or other legal duty by defendant's guards to be alert and respond to weather conditions and roof leaks.

APPEAL by plaintiff from *Wood, Judge*. Judgment entered 4 April 1980 in District Court, COLUMBUS County. Heard in the Court of Appeals 5 February 1981.

Plaintiff, a North Carolina corporation engaged in the manufacture of garments, brought this action seeking to recover from defendant, a corporation engaged in the security field, damages sustained by plaintiff, based on breach of contract and negligence.

Plaintiff alleged in its complaint the existence of a contract between the parties wherein defendant promised to provide to plaintiff an asset protection service. This service included furnishing security guards who would routinely inspect the manufacturing and storage buildings at plaintiff's plant in Whiteville. Such inspections were to be performed at least once every hour and defendant's guards were to notify plaintiff of any hazard whatsoever threatening plaintiff's assets.

Plaintiff further alleged that at some time during the weekend of 12 November to 15 November 1976 while defendant's security guards were on duty, one of plaintiff's warehouses sprang tremendous leaks in its roof due to unusual weather, and that fabrics stored in the warehouse suffered water damage in the amount of \$7,300 as a result. By failing to observe and/or to report to plaintiff the hazardous condition of the warehouse roof, the security guards were negligent and

Blue Jeans Corp. v. Pinkerton, Inc.

such negligence caused the damage to plaintiff's property. Plaintiff also alleged that the guards' failure to inspect the warehouse and/or to report the leaks constituted contract breaches that caused the property damage.

In its answer, defendant relied *inter alia* on the contract between the parties. The service authorized by the contract was as follows: "Guard will be alert and respond to and report on conditions of fire, theft, trespass and vandalism." Defendant alleged that under the contract there was no duty to seek out leaks in the plaintiff's building.

Defendant moved for summary judgment. In ruling on defendant's motion, the trial judge considered the following: the affidavits of the two security guards assigned to plaintiff's plant on 12-15 November, stating that they were instructed to be on the lookout for fire, theft, trespass and vandalism, and not weather conditions or leaks; the affidavit of defendant's district manager, including a copy of the agreement between the parties; the affidavit of plaintiff's vice president, stating that the pre-contractual negotiations between the parties included representations by defendant that it would provide security with regard to fire as well as other acts of God including weather; a letter from defendant to plaintiff detailing the security services defendant offered; and the security service reports prepared by defendant's two guards with regard to their shift at plaintiff's plant on 12-15 November.

The trial court granted defendant's motion for summary judgment and plaintiff has appealed.

Lee & Lee, by J.B. Lee, for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant appellee.

WELLS, Judge.

On motion for summary judgment, the burden on the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 656, 267 S.E. 2d 584, 586 (1980). If the movant carries this burden by showing that an essential element of the opposing party's claim is non-existent, then the burden shifts to the non-moving party to either show that a

Blue Jeans Corp. v. Pinkerton, Inc.

genuine issue of material fact does exist or provide an excuse for not so doing. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 469-70, 251 S.E. 2d 419, 421-22 (1979).

Defendant's evidence properly before the court established the existence of the written contract between the parties in the form of a letter confirming plaintiff's order for services, signed by both parties, and specifying the service authorized, the hours of service, and the charges and rates. In clear and unambiguous language, the contract stated the conditions to which defendant's guards would be alert and respond: fire, theft, trespass and vandalism. Clear and express language of a contract controls its meaning, and neither party may contend for an interpretation at variance with its language on the ground that the writing did not fully express his intent. *Olive v. Williams*, 42 N.C. App. 380, 383, 257 S.E. 2d 90, 93 (1979). *See also Taylor v. Gibbs*, 268 N.C. 363, 365, 150 S.E. 2d 506, 507 (1966); 3 Corbin on Contracts § 573, at 357 (1960). Considered alone, the contract shows that an essential element of plaintiff's claim is non-existent, *i.e.*, defendant had no contractual duty to be alert to and report on weather conditions or roof leaks. Having carried its burden, defendant forced plaintiff to produce a forecast of its evidence. *See Moore v. Fieldcrest Mills, Inc.*, *supra*.

In its affidavit in response to defendant's motion for summary judgment, plaintiff's vice president stated that in pre-contractual oral negotiations, defendant's agents represented that defendant's service would provide a complete asset protection respecting all emergencies and acts of God including weather. Plaintiff also submitted a copy of a letter from defendant to plaintiff detailing the services defendant offered. Plaintiff's forecast of evidence fails to establish the existence of a genuine issue of material fact. Plaintiff has not controverted the validity of the written contract. Even if the parties did in fact discuss duties in addition to those named in the contract, such prior or contemporaneous negotiations are presumed to be merged in the written contract, *Fox v. Southern Appliances*, 264 N.C. 267, 270, 141 S.E. 2d 522, 525 (1965), and are therefore without effect. *Realty, Inc. v. Coffey*, 41 N.C. App. 112, 115, 254 S.E. 2d 184, 186 (1979).

Defendant's evidence also established the lack of any genuine issue of material fact with regard to plaintiff's negli-

State v. McAdams

gence claim. To recover damages for injury resulting from actionable negligence of defendant, plaintiff must show the existence of some legal duty owed to plaintiff by defendant, as well as defendant's breach of that duty, and that the breach was the proximate cause of plaintiff's injury. *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E. 2d 457, 461 (1972). Because defendant's uncontroverted evidence proved that the contract created no duty of defendant to be alert and respond to weather conditions and roof leaks, plaintiff has failed to show an essential element of its negligence claim, *i.e.*, the existence of the duty. *Moore v. Fieldcrest Mills, Inc.*, *supra*.

Considering all the evidence before the trial court on defendant's motion for summary judgment, we conclude that defendant established his right to judgment as a matter of law and that summary judgment for defendant was properly granted.

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. JOHN PATRICK McADAMS

No. 8012SC964

(Filed 3 March 1981)

1. Homicide § 21.9— shooting of wife — sufficiency of evidence of involuntary manslaughter

There was sufficient evidence of defendant's wantonness, recklessness, or other misconduct amounting to culpable negligence to support a verdict of involuntary manslaughter where such evidence tended to show that defendant sat on a couch in his living room while he oiled and cleaned his gun; his wife was seated to his right on the same couch; after cleaning the gun, defendant loaded it with 14 rounds of ammunition and pointed it out the front of the house, which was to his right; he noted that the bolt was stuck in the rear position, and he attempted to get the bolt to go forward by slamming it; the gun fired; defendant looked to see if the bullet had gone out the front of the house and observed that his wife had been shot; and defendant then called the operator to ask for police assistance and an ambulance, but he was so excited that the operator could not understand him.

State v. McAdams

2. Criminal Law § 38— death by shooting — earlier pointing of gun — evidence inadmissible

In a prosecution of defendant for the murder of his wife where defendant contended that he accidentally shot her, the trial court erred in permitting defendant's neighbor to testify that on the evening before the shooting she had told the defendant not to point the gun at her while he was cleaning it, since defendant's acts of negligence toward a party other than deceased on the day before the crime charged was inadmissible to show a culpably negligent disposition and did not show intent, design, guilty knowledge or exhibit a chain of circumstances throwing light on the alleged crime, and evidence of the two incidents of pointing a gun may have had a cumulative effect in the minds of the jurors rather than being viewed as evidence of two separate, independent incidents.

APPEAL by defendant from *Lee, Judge*. Judgment entered 16 May 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 February 1981.

Defendant was indicted for the murder in the second degree of his wife. At the conclusion of the State's evidence and at the close of all the evidence, defendant made a motion for dismissal of the charge and all lesser included offenses. The motions were denied, and the trial judge charged the jury that they could find defendant guilty of murder in the second degree, guilty of involuntary manslaughter, or not guilty. The jury found defendant guilty of involuntary manslaughter. Defendant was given an active sentence with a recommendation for work release, and he now appeals.

Attorney General Edmisten, by Associate Attorney General Sarah C. Young, for the State.

Assistant Public Defender John G. Britt Jr. for defendant appellant.

HILL, Judge.

[1] Defendant brings forward two assignments of error. We consider them in reverse order. Did the trial judge commit reversible error when he denied defendant's motion to dismiss at the close of all the evidence and submitted a charge of involuntary manslaughter to the jury? We hold that he did not.

Upon a motion for nonsuit or a motion to dismiss in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be considered. The evidence

State v. McAdams

must be deemed true and considered in the light most favorable to the State; discrepancies and contradictions therein are disregarded; and the State is entitled to every inference of fact which may be reasonably deduced therefrom. *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822 (1977).

Viewed in light of the standards set forth above, the evidence shows that on the evening of the fatal shooting, defendant fired his recently purchased .22 caliber rifle until its loading chamber was empty. Thereafter, defendant went into his house and sat on the couch in the living room, where he proceeded to oil and clean the gun. His wife was seated in a reclining position to defendant's right, on the same couch, watching T.V. After cleaning the gun, defendant loaded the rifle with 14 rounds of ammunition and pointed it out the front of the house, which was to defendant's right. He noted the bolt was stuck in the rear position, and he attempted to get the bolt to go forward by slamming it. The gun fired. Defendant looked to see if the bullet had gone out the front of the house and observed that his wife had been shot. Defendant testified that he did not remember whether the safety catch was on or whether his finger had been on the trigger.

Further evidence showed that defendant called the operator to ask for police assistance and an ambulance, but that the defendant was so excited the operator could not understand him. The State introduced an expert witness who testified that the gun could be "fooled" into going off without pulling the trigger, but only by going through some very special steps. The expert testified that he shot the gun several times and it never malfunctioned.

We hold that the trial judge did not err when he submitted the charge of involuntary manslaughter. Involuntary manslaughter is the unintentional killing of a human being, without either express or implied malice, by some unlawful act not amounting to a felony or naturally dangerous to human life, or by an act or omission constituting culpable negligence. See *State v. Foust*, 258 N.C. 453, 459, 128 S.E. 2d 889 (1963); 4 Strong's N.C. Index 3d, Homicide § 6.1, p. 537. Culpable negligence is more than the actionable negligence often considered in tort law, and is such recklessness or carelessness proximately resulting in injury or death as imports a thoughtless or needless indiffer-

State v. McAdams

ence to the rights and safety of others. *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977); *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E. 2d 905 (1978).

Applying these principles to the case *sub judice*, we conclude there is sufficient evidence of wantonness, recklessness, or other misconduct amounting to culpable negligence to support a verdict of involuntary manslaughter.

[2] Nevertheless, the defendant is entitled to a new trial. Defendant correctly argues in his second assignment of error that the trial judge erred by permitting defendant's neighbor, Marilyn Rodriguez, to testify that on the previous evening she had told defendant not to point the gun at her while he was cleaning it. At trial, defendant objected to the introduction of this testimony as being irrelevant.

The State contends the testimony is admissible. The commission of a certain act is never admissible to show the disposition of defendant to commit a similar act at some other time. Evidence is admissible, however, if offered for another purpose, that is to show *quo animo*, intent, design, guilty knowledge or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstances when incidents are so connected as to throw light on the alleged crime. *State v. Lowery*, 286 N.C. 698, 705, 213 S.E. 2d 255 (1975), *modified as to death penalty* 428 U.S. 902 (1976).

The issue in this case is whether defendant acted in a criminally negligent manner on 7 September 1979. Evidence of his acts of negligence toward a different party on 6 September 1979 is inadmissible to show a culpably negligent disposition and does not fit within the exceptions listed above. Evidence of the two incidents may have had a cumulative effect in the minds of the jurors rather than being viewed as evidence of two separate, independent incidents. For that reason, admission of the evidence was prejudicial. Defendant is awarded a

New Trial.

Judges HEDRICK and WEBB concur.

State v. Cason

STATE OF NORTH CAROLINA v. NORRIS KELVIN CASON

No. 8020SC926

(Filed 3 March 1981)

Homicide § 30.3— second degree murder case – submission of involuntary manslaughter as prejudicial error

In a prosecution for second degree murder in which all the evidence showed that defendant intentionally shot deceased and thereby caused his death, and defendant relied on the defense of self defense which is unavailable for a charge of involuntary manslaughter, the trial court committed prejudicial error in submitting involuntary manslaughter to the jury, and where the jury found the defendant guilty of involuntary manslaughter and acquitted defendant of all other degrees of homicide, defendant is entitled to be discharged.

APPEAL by defendant from *Mills, Judge*. Judgment entered 8 May 1980 in Superior Court, ANSON County. Heard in the Court of Appeals 10 February 1981.

The defendant was tried for second degree murder. The evidence tended to show that defendant shot James Edward Sturdivant three times while the two were engaged in an altercation. There was no evidence that the shooting was accidental. The defendant testified he did not intend to kill Mr. Sturdivant but shot at Sturdivant's hand. The defendant offered evidence that the shots were fired in self-defense.

The court submitted to the jury the charges of second degree murder, voluntary manslaughter, and involuntary manslaughter. The court instructed the jury that self-defense is a defense to second degree murder and voluntary manslaughter. It did not charge on self-defense as to involuntary manslaughter. The defendant was convicted of involuntary manslaughter and appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Henry T. Drake for defendant appellant.

WEBB, Judge.

All the evidence shows the defendant intentionally shot James Edward Sturdivant thereby causing his death. The defendant relied on self-defense for an acquittal. There was no

State v. Cason

evidence that the defendant accidentally shot James Sturdivant, and it was error to submit the charge of involuntary manslaughter. In *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980) our Supreme Court held it was prejudicial error to submit involuntary manslaughter to the jury when there was no evidence of involuntary manslaughter, and the defendant relied on self-defense for an acquittal to the other degrees of homicide. The superior court in that case had defined second degree murder and voluntary manslaughter as intentional killings rather than intentional acts that caused death. Since self-defense is not available to the charge of involuntary manslaughter, our Supreme Court said the jury could have concluded that an intentional shooting without an intent to kill was not a shooting in self-defense. The Supreme Court said the submission of involuntary manslaughter under the circumstances made it impossible to determine whether the jury had passed on the defendant's self-defense plea, and this was prejudicial error.

In the case sub judice, the court instructed on involuntary manslaughter as follows:

“For you to find the defendant guilty of involuntary manslaughter, the State must prove 2 things beyond a reasonable doubt. First, that the defendant acted unlawfully. The defendant's act was unlawful if it was an assault with a deadly weapon. Pointing a .22 caliber pistol and shooting another without justification would constitute an assault with a deadly weapon. Second, the State must prove that this unlawful act proximately caused James Edward Sturdivant's death.”

The court in effect charged the jury that pointing a pistol at James Edward Sturdivant and shooting him without justification would be an assault with a deadly weapon, and this is an unlawful act. Self-defense was not available to the defendant on the involuntary manslaughter charge. It could be that the jury convicted the defendant of involuntary manslaughter under this charge for the act which they had found justified as self-defense for the other degrees of homicide. For this reason, we cannot determine that if the defendant had not been convicted of involuntary manslaughter, the jury would have found him guilty of another degree of homicide. This constitutes prejudicial error.

State v. Cason

In a homicide in which the defendant relies on self-defense, it is difficult under *State v. Ray*, *supra*, to submit a charge of involuntary manslaughter without evidence to support it and determine that, if the jury had not convicted the defendant of involuntary manslaughter, he would have been convicted of another degree of homicide. Involuntary manslaughter has as an element an unlawful act or criminal negligence, which element is not in the other degrees of homicide. Involuntary manslaughter is not a lesser included offense of murder or voluntary manslaughter as a lesser included offense is defined in *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975) and *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971). It is difficult to submit an offense which is not a lesser included offense when there is no evidence to support it and then determine that if the jury had not convicted on the offense submitted, they would have convicted on another offense which does not have all the elements of the offense of which the defendant was convicted. We believe there will be very few cases which do not contain reversible error when involuntary manslaughter is submitted to the jury without evidence to support it, and the defendant relies on self-defense as to the other degrees of homicide. See *State v. Brooks*, 46 N.C. App. 833, 266 S.E. 2d 3 (1980).

The defendant has been acquitted of all degrees of homicide other than involuntary manslaughter. The charge of involuntary manslaughter was not supported by the evidence, and we have held it was prejudicial error to submit it. The judgment of the superior court is reversed, and the defendant is ordered to be discharged.

Reversed.

Judges HEDRICK and HILL concur.

Sermons v. Peters, Comr. of Motor Vehicles

WAYLAND J. SERMONS v. ELBERT L. PETERS, JR., COMMISSIONER
OF MOTOR VEHICLES

No. 802SC646

(Filed 3 March 1981)

Automobiles § 126.4— willful refusal to submit to breathalyzer test

The trial court erred in concluding that petitioner did not willfully refuse to submit to a breathalyzer test where petitioner was told that he would automatically lose his license for six months if he refused to take the breathalyzer test; petitioner was then afforded all his rights as provided by G.S. 20-16.2(a), and he consciously and purposely declined the request to take the test; and petitioner's testimony that he refused to take the test because he was planning to plead guilty to the offense of driving under the influence and to seek a limited driving privilege and that, had he known his refusal to take the test would operate to revoke the limited driving privilege for a period of six months, he would have taken the test was irrelevant to the question as to whether petitioner willfully refused to submit to a breathalyzer test.

APPEAL by respondent from *Barefoot, Judge*. Judgment entered 12 May 1980 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 3 February 1981.

On 26 May 1979 petitioner was arrested for operating a motor vehicle while under the influence of intoxicating liquor. He was taken by State Highway Patrol Trooper T.G. Miller to the Beaufort County Sheriff's Department and was requested by Trooper Miller to submit to a breathalyzer test for the purpose of determining the alcoholic content of his blood.

Sergeant J.D. Leitschuh, a duly licensed breathalyzer operator, was present to administer the test. After the breathalyzer machine was readied, Sergeant Leitschuh asked the petitioner if he was ready to take the test. Petitioner inquired in a joking manner, "Do I really have to?" He was told that he did not have to, but if he refused, he would automatically lose his license for six months. Petitioner replied, "Well, I don't want to take it then." Petitioner testified that when he refused to take the test, he was planning to plead guilty to the offense of driving under the influence and to seek a limited driving privilege. Petitioner also testified that if he had known that his refusal to take the test would operate to revoke the limited driving privilege for a period of six months, he would have taken the test. Petitioner

Sermons v. Peters, Comr. of Motor Vehicles

also refused to sign the form acknowledging that he had been informed of his rights regarding the breathalyzer test.

At the trial on the driving under the influence charge, the court issued petitioner a limited driving privilege which was subject to any present or future revocation thereof by the Department of Motor Vehicles. On 7 August 1979 the Commissioner of Motor Vehicles notified petitioner that his driving privileges were being revoked for six months for wilfully violating N.C. Gen. Stat. § 20-16.2. After the revocation order was sustained at an administrative hearing, petitioner sought and obtained an order restraining the Division of Motor Vehicles from revoking his license until a judicial determination could be made as to the refusal or non-refusal of petitioner to submit to a breathalyzer test. The matter was heard before Judge Barefoot who made the following findings of fact:

4. That on the night of the petitioner's arrest, he was advised that if he did not take the test he would lose his operators license for six months and petitioner informed the arresting officer that he would plead guilty in the District Court and seek to obtain a limited driving privilege due to the fact that he had never had a prior conviction of driving under the influence, nor had he been charged with such offense.

5. The petitioner was not aware that a refusal to submit to a breathalyzer test would result in his disqualification for a limited driving privilege and was not advised that the breathalyzer test would have any adverse effect upon his ability to obtain a limited privilege.

6. That had the petitioner been aware that his failure to take the breathalyzer test would result in the loss of his right to obtain a limited driving privilege, he would have submitted to the breathalyzer test.

7. That the petitioner refused to sign the Form HP332A with reference to his rights regarding the breathalyzer.

Based on these findings, the court concluded:

1. That the failure of the petitioner to sign HP332A form with reference to his rights concerning the breathalyzer is some evidence that the petitioner did not fully

Sermons v. Peters, Comr. of Motor Vehicles

understand his rights regarding the breathalyzer test and the absolute effect of a refusal to take the test.

2. That the petitioner advised the arresting officer that he would plead guilty to the driving under the influence charge and request a limited driving privilege and petitioner was not advised that his refusal to take the test would have an adverse effect upon his ability to obtain a limited driving privilege.

3. That the petitioner's refusal to submit to the breathalyzer test was not a willful refusal. Therefore, the order of the Department of Motor Vehicles revoking the petitioner's license for six months is rescinded.

Respondent appealed.

James R. Vosburgh, for the petitioner-appellee.

Attorney General Edmisten by Associate Attorney General Jane P. Gray, for the respondent-appellant.

MARTIN (Robert M.), Judge.

The sole question raised on this appeal is whether the court below was correct in concluding that the petitioner did not wilfully refuse to submit to a breathalyzer test.

"Refusal" is defined as "the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey." *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 233, 182 S.E. 2d 553, 558, *rehearing denied*, 279 N.C. 397 (1971), quoting Black's Law Dictionary (4th Ed. 1951); *Etheridge v. Peters, Comr. of Motor Vehicles*, 45 N.C. App. 358, 263 S.E. 2d 308 (1980), *affirmed* 301 N.C. 76 (1980). "Willful" is defined as "voluntary; intentional." Black's Law Dictionary 1434 (5th ed. 1979). The term "wilful refusal" embraces "the concept of a conscious choice purposely made." *Joyner v. Garrett, supra* at 233, 182 S.E. 2d at 558.

The suspension of petitioner's driver's license is no part of the punishment for operating under the influence. The proceeding is civil and not criminal in nature. "Wilful refusal" is a necessary requirement under N.C. Gen. Stat. § 20-16.2(c) and the trial court has the duty of judicially determining this question. It was not incumbent upon the officers to explain the

Williford v. Williford

statutory rights relative to the granting of a limited driving privilege upon conviction of the offense charged. Whether or not the petitioner would have taken the breathalyzer test had he been aware of the law is irrelevant.

Petitioner's testimony indicated he was told that he would automatically lose his license for six months if he refused to take the breathalyzer test. The evidence shows that he was then afforded all his rights as provided by N.C. Gen. Stat. § 20-16.2(a), and he "consciously and purposely" declined the request to take the test. *Joyner v. Garrett, supra*. Moreover, the trial court's findings of fact dictate the conclusion that petitioner wilfully refused to take the breathalyzer test within the meaning of the statute.

Thus, the conclusion of the trial judge that the petitioner did not wilfully refuse to take the breathalyzer test is not supported by the evidence or by his findings of fact. It is an erroneous conclusion which must be reversed. The cause is remanded to the Superior Court for the entry of an order concluding that the petitioner is subject to the revocation of his operator's license pursuant to N.C. Gen. Stat. § 20-16.2 and reinstating the revocation order of the Division of Motor Vehicles.

Reversed and remanded.

Judges HEDRICK and CLARK concur.

M.G. WILLIFORD v. SALLIE WILLIFORD

No. 806DC683

(Filed 3 March 1981)

Appeal and Error § 14; Rules of Civil Procedure § 59— letter to clerk of court – no notice of appeal – motion for new trial

Defendant's letter to the clerk of court was not a written notice of appeal of a divorce judgment showing that defendant sought a review by the Court of Appeals but was a Rule 59 motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request.

Williford v. Williford

PURPORTED appeal by defendant from *McCoy, Judge*. Judgment entered 21 April 1980 in District Court, BERTIE County. Heard in the Court of Appeals 5 February 1981.

On 31 December 1979 plaintiff filed and properly served his complaint for divorce from defendant based upon one year's separation. Upon defendant's letter-motion, the court granted her an extension of time until 29 February 1980 in which to file her answer. On 13 February 1980 defendant filed with the court a letter written by her to plaintiff's attorneys. This letter stated that she could not give her husband a divorce for many reasons. On 17 March 1980 defendant filed another letter-motion stating she needed a six-month extension of time.

On 21 April 1980 plaintiff was granted a divorce. The defendant was not present. Defendant gave written notice by letter on 24 April 1980 that she wanted a new trial.

Pritchett, Cooke & Burch, by Stephen R. Burch, for the plaintiff-appellee.

Brandon and Cannon, by Thomas B. Brandon, III, for the defendant-appellant.

MARTIN (Robert M.), Judge.

On 22 April 1980, defendant wrote a letter to the Clerk of Superior Court, designated in the record as "Defendant's Written Notice of Appeal," which is as follows:

Mr. Hommy
Clerk of Superior Court
Dear Sir:

I am writing this (as Judge McCoy told me to) requesting the "Decision" made by him on Monday 21st of this week, granting my husband an absolute divorce (from a wife of 40 yrs.) to be set aside, and to give me the right to be present at a new hearing, and the time to secure an attorney (a real one this time, not a "fake") to file a countersuit in my behalf.

I feel my rights as an American citizen were taken from me, since I was in bed bleeding internally & loosing too much

Williford v. Williford

fluid from a perforated ulcer, & could not be there & could get no word to the Court stating my predicament.

I learned from my so called lawyer, but mostly from my own knowledge, that the case was already sealed and the Decision made by hearsay before the Judge announced it publicly. I feel I could get a better judgment from another county (one of my choosing) where no one participating knew either myself or my husband and with it being held without *outsiders* (Private) Maybe even in a judges chamber.

Thanking you I am

Yours sincerely,

s/ SALLY W. WILLIFORD

Rt. 3, Box 97

Windsor, N.C. 27983

I would like no one to know the time or place *except me* until the day of the hearing-

An order entered by the trial court, signed and filed 28 April 1980 reads as follows:

This matter coming on to be heard and being heard for the undersigned on April 28, 1980 Session of Bertie County District Court and the Court finds as a fact, the defendant, Sally Williford, entered written Notice of Appeal to the North Carolina Court of Appeals in the above captioned case on April 24, 1980.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant have twenty (20) days from this date to file case on Appeal and the plaintiff will have fifteen (15) days to file counterclaim.

Appeal bond is set at \$300.00.

This the 28 day of April, 1980.

s/ H. PAUL McCOY, JR.

Judge

The record on appeal discloses that defendant did not give oral notice of appeal at the trial and that the letter to the clerk

In re Meaut

was not a written notice of appeal showing that defendant sought a review by this court. N.C. Gen. Stat. § 1-279(d); Rule 3(d), N.C. Rules App. Proc. The trial court had no authority to cause an appeal to be entered for the defendant absent her request. N.C. Gen. Stat. § 1-279(a); Rule 3(a), N.C. Rules App. Proc. "The provisions of G.S. § 1-279 are jurisdictional, and unless they are complied with the appellate court acquires no jurisdiction of an appeal and must dismiss it." *O'Neill v. Bank*, 40 N.C. App. 227, 230, 252 S.E. 2d 231, 233 (1979).

We note, however, that if it was anything, defendant's letter was a motion in the cause for Judge McCoy to set aside the verdict and order a new trial. N.C. Gen. Stat. § 1A-1, Rule 59. It was Judge McCoy's duty to pass on the motion, if in fact he determined that the letter was a Rule 59 motion for a new trial, rather than to treat the letter as a notice of appeal. If defendant's letter is in reality a motion in the cause for a new trial, it has tolled the time for defendant to file and serve a notice of appeal. N.C. Gen. Stat. § 1-279(c); Rule 3(c), N.C. Rules App. Proc.

For the reasons stated above, we must dismiss the purported appeal.

Appeal dismissed.

Judges HEDRICK and CLARK concur.

IN THE MATTER OF JOSEPH A. MEAUT AND JOHN R. MOTT

No. 8012DC954

(Filed 3 March 1981)

Infants § 18- juvenile delinquency proceeding - insufficiency of evidence

The juvenile court erred in denying respondents' motions to dismiss for insufficiency of the evidence to sustain an adjudication of delinquency where respondents were accused of damaging automobiles being transported by rail by throwing rocks at the automobiles, but the State failed to introduce evidence tending to establish that the cars were owned by someone other than respondents, or that injury to the cars was inflicted by respondents.

In re Meaut

APPEAL by juveniles from *Guy, Judge*. Orders entered 29 July 1980 in District Court, CUMBERLAND County. Heard in the Court of Appeals 11 February 1981.

Juvenile petitions were filed in Cumberland County District Court alleging that each respondent is a delinquent child as defined by G.S. 7A-278(2) in that on or about 15 May 1980 each "did unlawfully, wilfully and wantonly injure a Ford truck . . . and a Ford Fiesta [sic] . . . the property of Seaboard Coast Line Railroad Company, by damaging and vandaliz[ing] said property" in violation of G.S. 14-160. The estimated value of the damage was alleged as \$299.14.

Evidence presented by the State at the adjudication hearing tended to show the following:

C.S. Massengill, a special agent for the Seaboard Coast Line Railroad, had the duty to protect the railroad's property. On 15 May 1980, in the performance of this duty, he went to an area beside some railroad tracks just south of Hope Mills, North Carolina, where the company had "had trouble." He saw the juvenile respondents in this area. When a train approached, the respondents "stopped short and waited on the train." When the train began passing through the area, respondents "just flicked some rocks at it, nothing serious." When railroad cars carrying a load of automobiles started coming by, however, "the boys were observed bending down and throwing several objects at the cars as they came by." The witness "heard several objects hit the automobiles." When the automobiles were inspected subsequently, "there was a large rock dent in the left fender of the Ford pickup . . . and the lower left windshield of the Ford Fiesta . . . was broken."

Respondents offered no evidence.

The juvenile court entered orders adjudicating respondents delinquent and placing them on probation for a period of one year. From these orders, respondents appeal.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Paul F. Herzog, Assistant Public Defender, Twelfth Judicial District, for juvenile appellants.

WHICHARD, Judge.

In re Meaut

Respondents contend the juvenile court erred in denying their motions to dismiss for insufficiency of the evidence to sustain an adjudication of delinquency. We are constrained to agree.

The juvenile petitions charged respondents with violation of G.S. 14-160 which, in pertinent part, provides: "[I]f any person shall wantonly and wilfully injure the personal property of another, causing damage in an amount in excess of two hundred dollars (\$200.00), he shall be guilty of a misdemeanor. . . ." G.S. 14-160(b) (1969). Proof of four elements appears essential to sustain an adjudication of delinquency under this section: (1) that personal property was injured; (2) that the personal property was that "of another," *i.e.*, someone other than the person or persons accused; (3) that the injury was inflicted "wantonly and wilfully"; and (4) that the injury was inflicted by the person or persons accused.

The North Carolina Juvenile Code gives respondents in juvenile adjudication hearings, with certain exceptions not pertinent here, "all rights afforded adult offenders." G.S. 7A-631(1979). The juvenile respondents thus are entitled to have the evidence presented in their adjudicatory hearing evaluated by the same standards as apply in criminal proceedings against adults. So evaluated, we find that the evidence here fails to establish the second of the above elements. The record is devoid of evidence as to the ownership of the automobiles allegedly damaged. While we intuitively perceive that the juvenile respondents did not hold title, our intuitive perceptions cannot rise to the status of evidence. Where, as here, no evidence of ownership is presented, the State has failed to present "substantial evidence of all material elements of the offense charged" as it is required to do "to withstand a motion [to dismiss]." *State v. Evans* and *State v. Britton* and *State v. Hairston*, 279 N.C. 447, 453, 183 S.E. 2d 540, 544 (1971).

The evidence also fails to establish the fourth element. The testimony of the State's witness tended to show that the train in question was en route from Rocky Mount to Hope Mills. The witness testified: "I did not personally inspect the cars in Rocky Mount. A member of our department told me that the cars were in good shape when they were in Rocky Mount." This testimony was properly stricken, upon respondents' motion, as hearsay.

State v. Fenner

Without this testimony there was no evidence before the court as to the condition of the automobiles prior to their arrival at the *locus in quo*, and such evidence was an essential foundation to a permissible inference that the damage resulted from the acts of respondents rather than from some other cause.

Because of the State's failure to introduce evidence tending to establish that the cars were "the personal property of another" and that the injury to the cars was inflicted by respondents, the record does not contain the "substantial evidence of all material elements of the offense [necessary] to withstand the motion to dismiss." *State v. Stephens*, 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956); *see also, State v. Lanier*, 50 N.C. App. 383, 273 S.E. 2d 746 (1981); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). The adjudication and disposition orders are therefore vacated, and the cause is remanded to the District Court for entry of judgments of dismissal.

Vacated and remanded.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. STEWART W. FENNER

No. 802SC973

(Filed 3 March 1981)

Automobiles § 127.1- driving under the influence – sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution of defendant for driving under the influence, second offense, where three competent witnesses who observed defendant shortly after he had been seen operating a vehicle on a highway testified that, in their opinion, he was intoxicated; they described his physical condition at the time in terms that tended to show a state of intoxication; defendant had obviously attempted to avoid an officer's routine roadblock; when defendant was pursued and stopped by a trooper who detected the odor of alcohol about defendant, he refused to take any sobriety tests, including the breathalyzer test; empty beer cans and cold beer were present in defendant's van; it was not necessary for the State to show "faulty driving" on the part of defendant; and defendant had one conviction of driving under the influence in 1956 or 1957 and another conviction for driving under the influence in 1978.

State v. Fenner

APPEAL by defendant from *Brown, Judge*. Judgment entered 19 August 1980 in Superior Court, TYRRELL County. Heard in the Court of Appeals 12 February 1981.

Defendant was convicted of a violation of G.S. 20-138(a) (second offense) on evidence tending to show that he operated a vehicle along U.S. Highway 64 west of Columbia while under the influence of intoxicating liquor. Judgment imposing a jail sentence was entered.

Attorney General Edmisten, by Assistant Attorney General Lucien Capone III, for the State.

Moore and Moore, by Regina A. Moore, for defendant appellant.

VAUGHN, Judge.

In his only assignment of error, defendant contends that his motion for dismissal should have been allowed. We hold that when the evidence in this case is considered in the light most favorable to the State, the State being entitled to the benefit of every reasonable inference arising therefrom, it was sufficient to survive defendant's motion and allow the case to be decided by the jury.

The evidence, in pertinent part, tends to show the following. On 11 July 1980, officers of the highway patrol were operating a routine checking station on U.S. Highway 64 west of Columbia. Defendant approached the roadblock in his van. Defendant then drove the van to the shoulder of the highway and headed in the opposite direction at a slow rate of speed. There was nothing else suspicious about the way the vehicle was being operated. One of the troopers pursued and stopped him. That officer testified that defendant

had a strong odor of intoxicant upon his breath. He was unsteady on his feet, had a little rocky motion going back and forth. His eyes were blood shot and glassy. It is my opinion that Mr. Fenner was under the influence . . . right beside the driver's seat was a cold can of beer. Behind him was two or three empty cans in a box.

Defendant refused to do any of the sobriety tests.

State v. Fenner

Another witness who saw defendant as the trooper brought him into the sheriff's office testified:

My best recollection is that Mr. Fenner had the odor of alcohol about him and his eyes were a little glazed. He expressed his feelings very very clearly. I saw Mr. Fenner moving about. I have known Mr. Fenner 16 months and in my opinion he was under the influence to an appreciable degree.

The breathalyzer operator at the sheriff's office testified:

When the machine was ready I offered to give the test to Mr. Fenner and he refused the test because he stated he had been tricked by the machine in Plymouth. I knew Mr. Fenner before and I have seen Mr. Fenner when in my opinion he was under the influence and I have seen him when in my opinion he was not under the influence.

On this occasion I smelled a strong odor of some intoxicant about his person. He seemed to be unsteady on his feet a little bit not as much as I have seen him in the past. It is my opinion that Mr. Fenner was under the influence to an appreciable degree.

In summary, three competent witnesses who observed the defendant shortly after he had been seen operating a vehicle on the highway testified that, in their opinion, he was intoxicated. They described his physical condition at the time in terms that tended to show a state of intoxication. That testimony, along with his obvious attempt to avoid the roadblock, his refusal to take any of the sobriety tests, including the breathalyzer, and the presence of the empty beer cans and cold beer, is sufficient to permit but not compel, the jury to infer that he was under the influence of some intoxicant. It was not necessary for the State to show "faulty driving" on the part of defendant. It needed only to show that defendant was under the influence while he operated the vehicle.

It is true that defendant elicited and offered testimony tending to show that he was not guilty. According to that testimony, he had had nothing to drink that day. The odor the officer smelled was mouthwash, the cold beer belonged to a man who had been riding with him, the empty cans were for sale, and he has difficulty getting around because of a broken leg, a broken

State v. Cleveland

foot and other ailments. He did not recognize the roadblock, but merely turned around in the highway to return to a nearby store because he had forgotten an item. He had one conviction of driving under the influence in 1956 or 1957, a conviction in 1976 for driving while his license was revoked and another conviction for driving under the influence in 1978.

The State's evidence tended to show guilt, and defendant's evidence tended to show innocence. The case thus presented a question of fact for the jury and not merely one of law for the court. Defendant's assignment of error, consequently, must be overruled.

No error.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. GEORGE CLEVELAND, JR.

No. 8014SC939

(Filed 3 March 1981)

Criminal Law §§ 73.2, 79— statement by one robber not hearsay – admissibility against another robber

A robbery victim's testimony that defendant's accomplice told him that if he did not give the accomplice his money defendant was going to hurt him was not inadmissible hearsay since the utterance was offered without reference to the truth of the matter asserted; furthermore, the threat by defendant's accomplice, made during their joint commission of the crime, was as competent against defendant as it would have been against the accomplice.

APPEAL by defendant from *Godwin, Judge*. Judgment entered 28 May 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 February 1981.

Defendant was convicted of robbery. Judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Associate Attorney General R. Darrell Hancock, for the State.

Robert E. Whitfield, for defendant appellant.

VAUGHN, Judge.

State v. Cleveland

The State offered evidence tending to show the following. Eric Earl testified that he rode around and drank beer with Michael Thompson in his car, and that defendant, known as June Bug, and two other men were along. Earl had just cashed his paycheck and had \$135.00 to \$140.00 in his pocket. He told Thompson that he would buy the beer if they would pay for the gas. He and Thompson later argued about the beer, and he wanted to go home because everyone was arguing. He told Thompson that he would give him \$2.00 to take him home but Thompson wanted \$20.00. Thompson then drove him past his mother's house, where he lived, and continued on to a local dairy bar several blocks from his home. He paid Thompson the \$2.00 and began to walk home, taking a shortcut around a church when Thompson called his name. He stopped to see what he wanted, and Thompson and defendant came over the churchyard fence following him. They told him to give them his money and that he would be hurt if he did not comply. When he said he did not have any money, both Thompson and defendant began to hit him about his eyes and mouth until he fell to the ground. Both of them went into his pockets and took his money.

A Durham police investigator's testimony tended to corroborate Earl's testimony. He arrested and questioned defendant, who told him several different stories about who robbed Earl and denied that he was involved. After further questioning, defendant gave police a signed statement saying that he was with Michael Thompson and watched Thompson beat up and rob Earl.

Defendant argues only one assignment of error in his brief. Earl, the victim, was allowed to testify that Thompson, one of the robbers, said, "If you don't give me your money, June Bug [defendant] was going to hurt me." Defendant argues that the testimony was hearsay and, therefore, inadmissible. We disagree. The hearsay rule has no application because the utterance was offered without reference to the truth of the matter asserted. Wigmore, Evidence § 1766 (Chadbourn rev. 1976). The threat by defendant's confederate, made during their joint commission of the crime, was as competent against defendant as it would have been against the confederate. Where two or more persons are acting together in the commission of a crime, an act or declaration by one of them, made in furtherance of the commission of the offense, is admissible against the others.

In re Browning

State v. Sanders, 276 N.C. 598, 174 S.E. 2d 487 (1970), *death sentence vacated*, 403 U.S. 948, 91 S. Ct. 2290 (1971); *State v. Davis*, 177 N.C. 573, 98 S.E. 785 (1919). The declaration is but a part of the totality of the circumstances in this case.

No error.

Judges WELLS and BECTON concur.

IN THE MATTER OF: DAVID A. BROWNING, APPELLEE, AND WILKIE CONSTRUCTION COMPANY, INC., EMPLOYER, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT

No. 8029SC681

(Filed 3 March 1981)

Master and Servant § 111— Employment Security Commission – appeal from decision not timely

The superior court had no authority to entertain claimant's appeal and enter its order reversing the decision of the Employment Security Commission denying claimant unemployment insurance benefits, since claimant did not comply with the provisions of G.S. 96-15(h) and (i) in giving his notice of appeal and stating his grounds therefor within ten days of the notification or mailing of the Commission's decision.

APPEAL by the Employment Security Commission of North Carolina from *Howell, Judge*. Order entered 15 April 1980 in Superior Court, McDOWELL County. Heard in the Court of Appeals 5 February 1981.

Kyle D. Austin, for the claimant appellee.

Staff Attorney Gail C. Arneke, for the appellant Employment Security Commission.

HEDRICK, Judge.

This is an appeal by the Employment Security Commission from an order of Judge Howell entered on 15 April 1980. G.S. § 96-15 in pertinent part provides:

(h) Appeal to Courts. — Any decision of the Commission [Employment Security Commission], in the absence of an appeal therefrom as herein provided, shall become final 10

In re Browning

days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has filed notice of appeal with the Commission within such 10-day period and exhausted his remedies before the Commission as provided by this Chapter. . . .

(i) Appeal Proceedings. — The decision of the Commission shall be final, subject to appeal as herein provided. Within 10 days after the decision of the Commission has become final, any party aggrieved thereby who has filed notice of appeal within the 10-day period as provided by G.S. 96-15 (h) may appeal to the superior court of the county of his residence. . . . In every case in which appeal is demanded, the appealing party shall file a statement with the Commission within the time allowed for appeal, in which shall be plainly stated the grounds upon which a review is sought and the particulars in which it is claimed the Commission is in error with respect to its decision. . . .

The requirements of G.S. § 96-15(h) and (i) are mandatory and not directory; they are conditions precedent to obtaining judicial review and failure to comply with them requires dismissal. *In re State ex rel. Employment Security Commission*, 234 N.C. 651, 68 S.E. 2d 311 (1951).

The record before us discloses that the decision of the Employment Security Commission affirming the decision of the appeals referee in denying claimant unemployment insurance benefits was mailed to the claimant on 17 September 1979. The record further discloses the following letter, received by the Commission on 2 October 1979:

David A. Browning

Rt 2 Box 278

Nebo, NC 28761

S.S. No. 213-32-1174

Rt 2 Box 278

Nebo, N.C. 28761

Wilkie Const. Co.

P.O. Box 997, Lenoir N.C.

28645

Employment Security Comm.

Raleigh, N.C.

Claims No. 16342

Appeals Docket No.

X1-U1-8675

To Whom It May Concern:

In re McElwee

Would like to give notice of Appeal, of the Decision [sic] made in your your [sic] letter mailed September 17, 1979

David A. Browning

Likewise, the record shows that by letter dated 5 October 1979, received by the Commission on 8 October 1979, the claimant basically gave his "grounds" for appeal. The record before us conclusively discloses that the claimant did not comply with the provisions of G.S. § 96-15(h) and (i) in giving his notice of appeal and stating the grounds thereon within ten days of the "notification or mailing" of the Commission's decision. Thus the Superior Court had no authority to entertain the appeal and enter its order reversing the decision of the Commission.

The order of the Superior Court is vacated and the cause is remanded to the Superior Court for the entry of an order dismissing the appeal of claimant from the decision of the Commission mailed 17 September 1979. The costs of the appeal to this Court will be taxed against the Employment Security Commission.

Vacated and remanded.

Judges MARTIN (Robert M.) and CLARK concur.

IN THE MATTER OF: THE APPEAL OF WILLIAM H. McELWEE, JR., WILLIAM H. McELWEE, III, ELIZABETH McELWEE CANNON, DOROTHY PLONK McELWEE AND JOHN PLONK McELWEE; R.B. JOHNSTON AND SONS; AND PAUL OSBORNE and PRESLEY E. BROWN LUMBER COMPANY FROM THE VALUATION OF CERTAIN OF THEIR PROPERTIES BY WILKES COUNTY FOR 1977

No. 8010PTC649

(Filed 17 March 1981)

1. **Taxation § 25.4— ad valorem taxes – sufficiency of newspaper notice of schedules**

Notice published in a newspaper on 26 September 1974 that schedules for the revaluation of property in the county, which would be effective as of 1 January 1977, had been adopted by the county commissioners on 24 September 1974 and were available for inspection for a period of ten days met the requirement of G.S. 105-317(c) and did not violate due process.

In re McElwee

2. Taxation § 25.4— appraisal of property for ad valorem taxes – whole record test

Although appraisers failed to visit or observe petitioners' property in appraising it for ad valorem taxation, there was no showing that the appraisal substantially exceeded the true value in money of the property, and the record as a whole supported a determination by the Property Tax Commission that the highest and best use of the property is its present use for growing timber, that the market value and use value should therefore be the same, and that it was properly valued as forest land at \$100 per acre.

Judge WELLS dissenting.

APPEAL by petitioners from an Order of the North Carolina Property Tax Commission entered 26 October 1979. Heard in the Court of Appeals 3 February 1981.

In accordance with G.S. 105-286, a reappraisal of all land within Wilkes County was conducted during 1974. The appraisal became effective 1 January 1977.

As provided by G.S. 105-299, the county contracted with a professional, the Allen Appraisal Company, to carry out the reappraisal. Allen developed a plan which, pursuant to G.S. 105-277.6, established a schedule for the present use value of qualifying agricultural, horticultural and forest lands.

Normally, the fair market value and use value schedules differ, with the use schedule being the lower of the two, but in this instance the two schedules were the same. Both schedules provided for the appraisal of forest land as follows:

Good	— \$300/acre
Fair	— \$200/acre
Poor	— \$100/acre
Wasteland	— \$ 50/acre

The schedules along with standards and rules that had been established were reviewed and approved by the Wilkes County commissioners on 26 September 1974. On the same day the following notice was published in a county newspaper, the *Journal Patriot*:

NOTICE

Schedules, standards and rules for the next revaluation of Wilkes County were approved by the Board of County Commissioners in regular meeting, September 24, 1974. They

In re McElwee

are open to examination by any property owner of the County at the Office of the Tax Supervisor for a period of 10 days.

Petitioners are owners of large boundaries of timberland in Wilkes County. Their land was valued at \$100 per acre under the new plan. Petitioners were not satisfied with the valuation and filed a complaint with the Wilkes County Board of Equalization and Review. The Board upheld the valuation, and petitioners appealed to the North Carolina Property Tax Commission. Petitioners contended that the use value schedule was improperly adopted. They further contended before the Commission that an income approach, which would result in a per acre use value of only \$30 to \$40, should have been adopted.

The Commission conducted a hearing and made findings of fact which show substantially that the lands involved are timberlands which highest and best use is their present use; that the land is poor for timber production and would only have gross annual yield of \$30-\$40 per acre; that timberland sales in the area between 1974 and 1978 ranged from \$93 to \$357; that no challenge to the use schedule had been made by petitioners during the 30-day period provided by G.S. 105-317; that although petitioners had relied on the income approach to reach their estimate of \$30-\$40 per acre, they had introduced no specific evidence to support the gross income figures, expense figures or capitalization rate; and further that petitioners had introduced no evidence of timberland sales that would support their \$30-\$40 figure.

From the facts, the Commission concluded that the highest and best use of the property is that for which it was being used (growing timber); that the market value and use value should therefore be the same; that petitioners in arriving at their \$30-\$40 figure had failed to understand the meaning of "present use value," as that term is defined in G.S. 105-277.2; that the county had complied with G.S. 105-317 in the adoption of the use schedules; and that after the 30-day period for challenge has expired, appeals must be based on the application of the schedules rather than the schedules themselves. The Commission sustained the county's appraisal, and the taxpayers appealed.

McElwee, Hall, McElwee & Cannon, by W.H. McElwee and William H. McElwee III, for petitioner appellants.

In re McElwee

Brewer & Freeman, by Joe O. Brewer and Paul W. Freeman Jr., for respondent appellee.

HILL, Judge.

Here, we review the acts of the North Carolina Property Tax Commission, a state administrative agency, to determine whether the evidence presented to the Commission supported its conclusions. In reviewing the orders of state agencies, this Court may not make findings of fact contrary to the Commission when the findings of the Commission are supported by "competent, material, and substantial evidence." *In re Appeal of Amp, Inc.*, 287 N.C. 547, 561, 215 S.E. 2d 752 (1975); *In re Land and Mineral Company* (Filed 2 December 1980).

G.S. 150A-51 specifies the scope of review and the power of courts in disposing of cases appealed from state agencies and is to be read in conjunction with *In re Appeal of Amp, Inc.*, *supra*.

That statute provides in part:

The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

.

(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

When we consider the judicial rule of *Amp*, together with G.S. 150A-51, the standard of review we must apply is whether the decision of the Commission is supported by "competent, material, and substantial evidence." The scope of judicial review is the "whole record" test. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). In reviewing the commissioners' decision, we must keep in mind the principle of law that ad valorem tax assessments are presumed to be correct. See *In re Appeal of Amp, Inc.*, *supra*; *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811 (1972); *In re Land and*

In re McElwee

Mineral Company, supra. The presumption places the burden of proof that the assessments are incorrect on the taxpayer.

Justice Copeland has set forth a two-pronged test the Court must apply in determining whether the taxpayer has overcome that presumption.

[I]n order for the taxpayer to rebut the presumption he must produce 'competent, material and substantial' evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property. See *Albemarle Electric Membership Corp. v. Alexander, supra*, 282 N.C. 410, 192 S.E. 2d at 816-17. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*. *Id.* ...

Amp, supra, at p. 563.

[1] Petitioners first assign as error the Commission's failure to conclude as a matter of law that the notice published in the *Journal Patriot* on 26 September 1974 violated their due process rights as guaranteed by the state and federal constitutions; further violated G.S. 105-317; and thus was void. Petitioners contend the notice failed to inform them, as well as other interested property owners, that schedules which affected their property had been adopted and were available for inspection.

G.S. 105-317(c) states:

(c) The schedules of values, standards, and rules required by (b)(1) above shall be reviewed and approved by the board of county commissioners before they are used. When the board of county commissioners approves the schedules, standards and rules, it shall issue an order adopting them and shall cause a copy of the order to be published in the form of a notice in a newspaper having a general circulation in the county, stating in the notice that the schedules, standards, and rules to be used in the next scheduled reappraisal of real property have been adopted

In re McElwee

and that they are open to examination by any property owner of the county at the office of the tax supervisor for a period of 10 days from the date of publication of the notice.

In the present case, the schedules were adopted 24 September 1974, and a notice announcing their adoption was published 26 September 1974. The schedule and notice related to reappraisals that would be effective as of 1 January 1977. We agree with petitioners that the schedules were established far in advance of the effective date of the reappraisal and that the county made only token efforts to inform property owners that the schedules had been adopted. The statute, however, does not set a time frame or a minimum size for the notice, and the notice meets each requirement set forth in the statute. After applying the proper standard and scope of review, we find that the Commission properly concluded that the county complied with G.S. 105-317.

Furthermore, we find that the notice was not violative of due process. Appellee cites *Brock v. Property Tax Comm.*, 29 N.C. App. 324, 224 S.E. 2d 295 (1976), *reversed and remanded*, 290 N.C. 731, 228 S.E. 2d 254 (1976), as a case which deals with a published notice remarkably similar to the one before us. In *Brock*, although both appellate courts upheld the sufficiency of the notice, neither court expressly dealt with the adequacy of the size of the notice or its timing. It is established, however, that "only when the action of the . . . authorities is found to be arbitrary [will] the courts interfere with assessments on the asserted violation of the due process clause." *Hotel Co. v. Morris*, 205 N.C. 484, 487, 171 S.E. 779 (1933). We do not believe the action of the county in printing the notice in the manner it did and at the time it did was arbitrary so as to make the notice void. Petitioners' assignment of error is without merit and overruled.

[2] We next address the remaining assignments of error brought forth by the petitioners as a class and apply the two-pronged test set out in *Amp.*, *supra*. When we administer the "whole record" test to the facts set out in the record, we find some irregularity; i.e., the appraisers failed to visit or observe the property in making the appraisal. Nevertheless, the second prong of the test — i.e., whether the assessment substantially

In re McElwee

exceeded the true value in money of the property — is not violated.

The appraiser in preparing the use value schedule divided the county property into classifications, assigning a different value based on productivity, soil classification, and location. The tax supervisor valued the land in question in the lowest production classification.

There was evidence in the record supporting a use value as low as \$30 and as high as \$100 — the result of a difference of opinion among experts. When we apply the facts to the standard and scope of review set out above, we conclude the decision of the Property Tax Commission should be

Affirmed.

Judge ARNOLD concurs.

Judge WELLS dissents.

Judge WELLS dissenting:

I believe that the final decision of the Property Tax Commission must be reversed because it is affected by a manifest error of law. *See* G.S. 150A-51(4). If the decision of the Commission is allowed to stand, the sensible and salutary policies underlying G.S. 105-277.2 through 105-277.6, establishing classifications for ad valorem taxes on agricultural and forestland, will be defeated. Generally, real property is taxed at its true value. G.S. 105-317. In finding the true value for purposes of appraisal, various factors may be considered:

§105-317. Appraisal of real property; adoption of schedules, standards, and rules. — (a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:

- (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any

In re McElwee

other factors that may affect its value except growing crops of a seasonal or annual nature.

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By establishing the special classification as to farm, horticultural, and forestlands, G.S. 105-277.3, the General Assembly provided the means for these lands to become eligible for appraisal on a special basis, whereby present use becomes the standard, avoiding appraisal on the factors of general application set out in G.S. 105-317(a)(1). We quote in pertinent part:

§ 105-277.4. Agricultural, horticultural and forestland — application for taxation at present-use value. — (a) Property coming within one of the classes defined in G.S. 105-277.3 but having a greater value for other uses shall be eligible for taxation on the basis of the value of the property in its present use if a timely and proper application is filed with the tax supervisor of the county in which the property is located. The application shall clearly show that the property comes within one of the classes and shall also contain any other relevant information required by the tax supervisor to properly appraise the property at its present-use value. . . .

(b) Upon receipt of a properly executed application, the tax supervisor shall appraise the property at its present-use value as established in the schedule prepared pursuant to G.S. 105-277.6(c). . . .

(c) Property meeting the conditions herein set forth shall be taxed on the basis of the value of the property for its present use. . . .

G.S. 105-277.6(c) provides in pertinent part:

(c) To insure uniform appraisal of the classes of property herein defined in each county, the tax supervisor, at the time of the general reappraisal of all real property as required by G.S. 105-286, shall also prepare a schedule of land values, standards and rules which, when properly applied, will result in the appraisal of the property at its present-use value. . . .

G.S. 105-277.2(5) establishes the criteria for finding present-use value:

In re McElwee

- (5) "Present use value" means the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell, assuming that both of them have reasonable knowledge of the capability of the property to produce income in its present use and that the present use of the property is its highest and best use.

Through the enactment of the foregoing statutes, the General Assembly established the means for such land to remain in its traditional use and avoid being taxed on the value of similar property sold for or devoted to other non-farming uses. The classic examples, common in our experience and observable all around us, are farms and forests existing side-by-side with residential subdivisions, resorts, shopping centers and industrial parks. If the farmer or forester wants to keep his land in agricultural production under such circumstances, the General Assembly has provided the opportunity, if not the incentive, for him to do so by establishing a special tax classification. *See generally W.R. Company v. Property Tax Comm.*, 48 N.C. App. 245, 269 S.E. 2d 636 (1980). The Commission has not correctly applied the law under the facts of this case. I quote from the Commission's decision in pertinent part as follows:

From our review of the applicable law, the evidence and our findings of fact, we conclude and so decide that the County's appraisal of the subject land is not in excess of its forest land use value. All of the witnesses testified that although the subject land was poor timber land, its highest and best use was the commercial growing of trees. The County's appraisal is entirely consistent with this testimony. It has appraised the land for market value purposes and for use value purposes at \$100 per acre. That is the figure in the County's schedules of value for poor timber land. It seems obvious to us that if the highest and best use of the property is what it is being used for, the market value and the use value should be the same figure. The \$100 figure is also supported by sales of comparable properties introduced by the County. Appellants' estimates of value were developed based on general statements about stumpage value, net income and capitalization rates. . . .

Stanley v. Stanley

No evidence was introduced to indicate that appellants would be willing sellers of any of the subject land or that they would expect to acquire any similar land for less than \$100.

The thrust of the Commission's order is that market value, no matter how established, equates present use value. This result flies in the face of the clear directive of the statute to find market value by the criteria of "the capability of the property to produce income in its present use." Such a methodology does not allow substituting prices obtained for sales of comparable land as the criteria, which apparently is the position taken by the Commission. It is clear from the Commission's findings of fact that it considered both the income producing capability and sales of other timberland in reaching its conclusions. But it is clear from its conclusions that it relied on comparable sales in reaching its result. Thus, the Commission has effectively but erroneously negated the statutory scheme and directives we have discussed in this dissenting opinion.

Additionally, the notice published by the county does not meet the requirements of the statute, G.S. 105-317. The statute requires the Board of County Commissioners to publish *a copy of its order*. The notice in this case does not even purport to be a copy of the Commissioners' order. It is not signed, and nothing in its contents indicates who authorized it or required its publication. It is outstandingly lacking in official qualities. Such an informal, unofficial, and uninformative utterance published so modestly and so far in advance (27 months) of the effective date also fails, in my opinion, to comport with due process requirements.

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SARAH W. STANLEY v. LACEY GARDNER STANLEY, JR.

No. 8026DC627

(Filed 17 March 1981)

1. Divorce and Alimony § 24.6— award of child support proper

There was no merit to defendant's contention that the trial court violated his constitutional rights by ordering him to pay \$200.00 per month for the support of the parties' child, since (1) defendant abandoned his

Stanley v. Stanley

exception to the finding that the child had individual financial needs well in excess of the sum of \$200.00 per month, and therefore had no exception on which to base his argument regarding the use of future child support payments to finance the private education of the child; (2) defendant did not present for the trial court's consideration his argument that the court, in considering the same evidence for both the past and future child support awards, violated his rights to due process and equal protection by awarding plaintiff \$400.00 per month for the thirty-six months immediately preceding the suit and \$200.00 per month in the future, and the trial court obviously based the two awards in question on different evidence; and (3) the trial court properly based its award of prospective child support on defendant's earning capacity rather than on his present ability to pay, as the court's findings indicated that defendant had displayed a continuous and intentional course of conduct designed to allow him to remain free of, ignore, and avoid his parental responsibilities.

2. Divorce and Alimony § 24.6— child support — reimbursement of mother proper

A mother is entitled to bring an action against the non-supporting father for reimbursement of sums expended in support of a minor child after the parties were divorced; therefore, the trial court properly awarded plaintiff \$14,400.00 as reimbursement for expenditures by her during the three year period preceding her suit for child support, and evidence clearly supported the trial court's finding of fact that plaintiff had expended an amount in excess of \$400.00 per month in support of the child during the three year period. G.S. 50-13.4.

3. Divorce and Alimony § 24.6— child support — determination of father's fair share

The trial court did not err in determining that the defendant father's fair share of child support for the three years immediately prior to suit was \$400.00 per month, since defendant was employed during a part of the three years but unemployed and without any income during some of the time and the court was therefore forced to consider both defendant's ability to pay and his earning capacity in arriving at the amount of his share of the support; evidence was sufficient to support the court's finding that defendant had failed to exercise his earning capacity in disregard of his parental obligation to support his child; and the trial court could properly consider evidence that defendant moved often and went for long periods, sometimes years, without contacting the child or his ex-wife, thereby defeating her attempts to force him to support his child and preventing her from determining what his ability to pay was, and evidence that defendant, even during the time that he was earning substantial salaries, could have supported the child and chose not to do so.

APPEAL by defendant from Jones, Judge. Order entered 29 January 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 15 January 1981.

Plaintiff instituted this action on 8 October 1979 for reimbursement of amounts she had expended in the three years

Stanley v. Stanley

immediately preceding the suit for support of the parties' fifteen-year-old daughter and for future payments of child support from defendant, her former husband. Plaintiff's evidence at trial tended to show that the parties were married on 30 November 1963 and were divorced 20 September 1965. The parties' child was born 23 September 1964, some months after the parties had separated.

Plaintiff was awarded custody of the child on the date of the divorce and had supported the child alone since her birth. Defendant had provided \$70.00 for plaintiff's and the child's support after the parties had separated and prior to the child's birth and had refused to contribute any amount for maintenance of the child after her birth. Defendant's father had given plaintiff \$200.00 to help pay expenses incurred at the child's birth. Plaintiff's numerous attempts to serve defendant with legal process over the years to obtain child support were unsuccessful because defendant had moved so often. She had allowed defendant to see the child whenever he had requested, though she would not allow the child to leave with him since she did not know where defendant lived.

After salary deductions, plaintiff earns \$162.26 weekly as an office manager and has monthly expenditures for maintenance of the child of between \$455.00 and \$512.00. Plaintiff had expended approximately \$465.00 monthly for the child's maintenance over the three-year period immediately prior to the suit. The child had been hospitalized for several long periods of time in 1979 and plaintiff had incurred medical expenses that year of between \$420.00 and \$456.00 which have not been reimbursed by insurance.

Defendant's evidence tended to show that he had paid \$10.00 per week to plaintiff under a court order for the first two years of their child's life. He had made no child support payments since that time, although he had earned \$800.00 monthly and \$1,500.00 monthly at his last two jobs. Defendant is presently unemployed and has no income. His monthly living expenses are \$988.40. He has been trying unsuccessfully to obtain employment as an airline or corporate pilot for the past year and a half. Defendant has never had any serious illness requiring hospitalization and has never been required to stay out of work for any length of time for health reasons.

Stanley v. Stanley

Defendant had moved quite often and had been unaware of plaintiff's efforts to serve him with process over the past fifteen years. He had seen the child only six times since her birth. When he had told plaintiff in 1970 that he was not interested in their living together again, plaintiff had told him that she did not want anything from him and would never allow him to see the child. He had again requested visitation rights in 1977 and had offered to pay child support, but was told by plaintiff that she did not want the money and would not allow him to see the child.

After the trial, the judge made findings of fact which, except as quoted, are summarized as follows. Although defendant had provided modest sums for the child's support during the first two years of her life, he had provided nothing for her support since 1966 and, of necessity, plaintiff had been the sole provider of support and maintenance for the child since that time.

14. Defendant, for the three-year period preceding the initiation of this action, was an able-bodied man, and suffered no illness or infirmity which would have impaired or impeded his earning capacity or his ability to provide a reasonable sum for the support of the child.

15. Defendant, for the three-year period preceding the initiation of this action, was capable of earning substantial sums of money, and had the ability to provide ample support for the child.

The child had required extensive medical care on several occasions.

17. Thus, Plaintiff has incurred extraordinary medical expenses for the child, which expenses in 1979 totalled \$4,474.93. A major portion of these medical expenses have been or should be covered by insurance; however, Plaintiff has incurred and will incur a great amount of uninsured medical and hospitalization expenses as a result of the illnesses of the child.

18. Plaintiff has expended for the support and for the needs of the child for the three-year period preceding the initiation of this action an amount in excess of \$400.00 a month. Defendant's fair share of support for that period of time is \$400.00 per month.

Stanley v. Stanley

19. Defendant is presently an able-bodied man, capable of earning substantial amounts of money and Defendant has the ability to provide ample support for the child.

20. Defendant is temporarily unemployed and has been unemployed, except for brief periods, since July of 1978.

21. Defendant's training and expertise is as a commercial pilot. Defendant has been flying for over 20 years and had been a commercial pilot for almost 11 years.

22. Defendant's age may preclude him from being employed by a major airline as a pilot.

23. The last job which Defendant had as a commercial pilot paid him a gross salary of \$1,500 per month.

24. Though Defendant might not be able to find employment paying this sum, Defendant does have the expertise, training and experience to find gainful employment.

25. Defendant has not make [sic] sufficient efforts to find employment and pay to Plaintiff a reasonable sum for the support of the child.

26. Defendant's failure to exercise sufficient effort to find employment and to exercise his earning capacity is and has been in disregard of his obligation to provide reasonable support for the child.

The child has individual financial needs in excess of \$200.00 per month and defendant should be required to pay plaintiff a reasonable sum as support for the child. The plaintiff is fit and proper to have custody of the child and the defendant is fit and proper to have visitation privileges.

Based on these findings of fact, the trial judge concluded as a matter of law that plaintiff was entitled to reimbursement from defendant for his share of the support of the child during the three-year period immediately preceding the suit in the amount of \$14,400.00 (\$400.00 per month). The court also concluded that plaintiff was entitled to \$200.00 per month as prospective child support for the child and that it was in the child's best interests for the plaintiff to have custody of her and for the defendant to have reasonable visitation privileges.

Stanley v. Stanley

From a judgment and order to that effect, the defendant appealed.

Farris, Mallard & Underwood by David B. Hamilton, for the plaintiff-appellee.

McConnell, Howard, Pruett & Toth by Rodney Shelton Toth, for the defendant-appellant.

MARTIN (Robert M.), Judge.

First, we note that defendant failed to set out and discuss his first and seventh assignments of error in his appellate brief, therefore, they are deemed abandoned. Rule 28(a), N.C. Rules App. Proc. In addition, defendant's brief is utterly void of argument or authority in support of his third assignment of error, therefore, it is also deemed abandoned. "App. R. 28(a) requires that a question be presented *and argued* in the brief in order to obtain appellate review." *Love v. Pressley*, 34 N.C. App. 503, 514, 239 S.E. 2d 574, 581 (1977), *rev. denied* 294 N.C. 441, 241 S.E. 2d 843 (1978).

Defendant's second assignment of error is that the trial court erred in denying defendant's Rule 12(b)(6) motion to dismiss plaintiff's complaint for failing to state a claim upon which relief could be granted.

A complaint is sufficient to withstand a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and the allegations contained therein are sufficient to give the defendant sufficient notice of the nature and basis of the plaintiff's claim to enable him to answer and prepare for trial. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E. 2d 583 (1977). For purposes of the motion, the allegations of the complaint must be treated as true. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). Measuring plaintiff's complaint by the foregoing rules, we find that the trial court did not err in denying defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted because the complaint clearly contains allegations of facts which, if true, would entitle plaintiff to the relief sought and does not contain any allegation which would act as an insurmountable bar to her recovery on

Stanley v. Stanley

the claims alleged. Defendant's second assignment of error is therefore overruled.

[1] Defendant's sixth assignment of error reads as follows: "[t]he trial court [erred] and violated the Defendant's constitutional rights to due process of law and equal protection of the law by ordering the Defendant to pay Two Hundred Dollars (\$200.00) per month to the support of the child based upon the findings of fact in the evidence." This assignment of error is based on 19 exceptions to the judge's findings of fact, on seven exceptions to the judge's conclusions of law and on an exception to the signing and entry of the order. Defendant presents three arguments in his brief regarding this assignment of error.

First, defendant argues that the award of future child support is erroneous because part of that award will be used to educate his child in a private school, an expenditure to which he has not consented. We note that although defendant excepted to the trial court's finding of fact that the child has individual financial needs well in excess of the sum of \$200.00 per month, he failed to set out that exception in his brief, thereby abandoning it. Rule 28(b)(3), N.C. Rules App. Proc. Therefore he has no exception on which to base his argument regarding the use of future child support payments to finance the private education of the child.

Second, defendant argues that because the trial court considered the same evidence for both the past and future child support awards, it violated his rights to due process and equal protection by awarding plaintiff \$400.00 per month for the thirty-six months immediately preceding the suit and \$200.00 per month in the future. The record does not reflect that this constitutional argument, if, indeed, it is a constitutional question, was presented to or considered by the trial court. As a general rule, this Court will not pass upon a constitutional question not raised and considered in the court from which the appeal is taken. *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976); *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E. 2d 911, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 623 (1975). Moreover, we fail to see any merit in defendant's argument on this point. The trial court obviously based the two awards in question on different evidence, as will be more fully discussed later.

Stanley v. Stanley

Third, defendant argues that the court erroneously based its award on defendant's earning capacity rather than on his ability to pay. With regard to an award of prospective child support, as a general rule, the court should consider, among other things, the amount which the defendant is earning when the award is made. *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E. 2d 144 (1971). "To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children. *Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912." *Robinson v. Robinson, supra*, at 468, 179 S.E. 2d at 147.

The trial court in the present case made such a finding of fact, finding number 26, as quoted previously. The evidence in the record clearly supports finding number 26 and findings numbers 19-25, also quoted previously. The record indicates that defendant has displayed a continuous and intentional course of conduct designed to allow him to remain free of, ignore, and avoid his parental responsibilities. After paying nominal sums to plaintiff for the child's support for two years, defendant has paid nothing for the child's support since 1966, despite the fact that defendant was employed during this period of time, earning as much as \$1,500.00 per month. Moreover, defendant evidenced his intent to avoid his parental responsibilities by constantly changing places of residence and employment and by repeatedly failing to inform plaintiff of his address. In short, the record is replete with evidence supporting the trial court's finding that defendant was failing to exercise his earning capacity because of a disregard of his parental obligation to provide reasonable support for his child. Thus the trial court was correct in basing its award of prospective child support on defendant's earning capacity rather than on defendant's present ability to pay. As noted above, the defendant has abandoned his exception to the finding that the child has financial needs in excess of \$200.00 per month which we note is also clearly supported by the evidence. All of these findings, in turn, support the trial court's conclusion that plaintiff is entitled to \$200.00 per month from defendant for the support, maintenance, health, education and welfare of the child. Therefore we affirm the court's award as to prospective child support.

Stanley v. Stanley

Defendant's fourth and fifth assignments of error attack the trial court's award of \$14,400.00 to plaintiff as reimbursement for expenditures by her during the three-year period preceding the suit in support of the child. Defendant's fourth assignment of error reads as follows: "[t]he trial court erred and deprived the Defendant of his constitutional rights of due process of law and equal protection of the law by awarding the Plaintiff back support for three (3) years prior to the institution of the action based upon the evidence and findings of fact." We have discussed defendant's constitutional argument above and have found it to be without merit.

[2] It is clear that a mother is entitled to bring an action against the nonsupporting father for reimbursement of sums expended in support of a minor child after the parties were divorced. *Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E. 2d 307 (1977). The father's liability in such a case is predicated upon N.C. Gen. Stat. § 50-13.4 which states in part:

(a) Any parent, . . . having custody of a minor child, . . . may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, . . . shall be liable, in that order, for the support of a minor child. . . .

As stated in *Tidwell v. Booker*, 290 N.C. 98, 115-6, 225 S.E. 2d 816, 826-7 (1976) and in *Hicks v. Hicks*, *supra* at 129-30, 237 S.E. at 308-9, this statute

imposes upon the father the primary duty to support the child, the mother's obligation being secondary.

. . .

A party secondarily liable for the payment of an obligation, who is compelled by the default of the party primarily liable therefor to pay it, may, by action brought within the period of the applicable statute of limitations, compel the party primarily liable to reimburse him for such expenditure. (Citations omitted.)

"The measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represented the

Stanley v. Stanley

defendant's share of support." *Hicks v. Hicks, supra* at 130, 237 S.E. 2d at 309. In the present case, the trial court found as fact that the amount plaintiff actually expended was in excess of \$400.00 per month. Defendant's fifth assignment of error reads as follows:

The trial court erred in awarding the Plaintiff a back award for child support based upon the findings of fact and the evidence that the Plaintiff had incurred extraordinary medical costs for the child and would incur a great amount of uninsured medical and hospitalization expenses without any evidence upon which to base the amount to be covered by insurance.

The record shows that plaintiff had not yet been fully reimbursed by insurance for certain medical expenditures in the child's behalf during the three-year period in question and therefore was unable to testify to the exact amount of her uninsured medical expenditures in the child's behalf. However, even excluding the medical expenses in question, the record clearly supports the trial court's finding of fact that plaintiff had expended an amount in excess of \$400.00 per month in support of the child during the three-year period. Therefore, defendant's fifth assignment of error is overruled.

[3] Thus, the final question which confronts us on this appeal is whether the trial court erred in determining that the defendant's fair share of support for the three years immediately prior to suit was \$400.00 per month.

N.C. Gen. Stat. § 50-13.4(c) states:

Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, *and other facts of the particular case.* (Emphasis added.)

This statute requires that in determining the defendant's share of support in an action for reimbursement, the court must consider, among other things, the ability of the defendant to pay during the time for which reimbursement is sought. *Hicks v. Hicks, supra*. However, just as when determining the defendant's liability for prospective child support, where the defend-

Stanley v. Stanley

ant failed to exercise his earning capacity in disregard of his parental obligation to provide reasonable support for his child, the court should base an award for reimbursement of past child support on defendant's earning capacity during the time for which reimbursement is sought.

Defendant again argues that the trial court erred in considering his earning capacity during the three-year period rather than his ability to pay. The record shows that during some of the time for which reimbursement is sought, the defendant was employed and during some of that time, he was unemployed and without any income. Therefore, the court was forced to consider both defendant's ability to pay, i.e., his actual earnings, and his earning capacity in arriving at the amount of defendant's share of support for the three-year period in question. We find that with regard to the time that defendant was unemployed, the evidence and the trial court's findings of fact numbers 14, 15, 20, 21, 23 and 25, which are supported by the evidence, clearly support its finding that the defendant had failed to exercise his earning capacity in disregard of his parental obligation to support his child. With regard to the time that the defendant was employed, although the trial court's findings supporting his conclusion that the defendant had the ability to provide \$400.00 per month in support of his child lack the degree of specificity which would be required in an action for prospective child support, they are adequate in this action for reimbursement due to the difficulty of proving what defendant's past income and living expenses were. He made no records of them available in response to plaintiff's discovery requests, except his income tax forms for 1978, and defendant's testimony on this issue was vague and somewhat confusing.

Moreover, N.C. Gen. Stat. § 15-13.4(c) clearly allows the trial court to consider "other facts of the particular case" in arriving at the amount of defendant's share of support in an action for reimbursement. Thus, while the defendant's ability to pay and his earning capacity are factors to be considered, they are not controlling. The court may also consider the conduct of the parties and the equities of the case. In this case, it would be inequitable to allow the defendant to prevail on his argument that the mother should have based her expectations for reimbursement solely on his ability to pay where the record clearly shows that he moved quite often and went for long periods,

Bone International, Inc. v. Brooks

sometimes years, without contacting the child or his ex-wife, thereby defeating her attempts to force him to support his child and preventing her from determining what his ability to pay was. In addition, defendant readily admitted that even during the times that he was earning substantial salaries, and therefore could have supported the child, he chose not to do so. A mother, who was forced, of necessity, to be the sole provider of support and maintenance for her child for fifteen years, should not be required to measure her expenditures in the child's behalf by guessing about the extent of the defaulting and absent father's ability to pay or earning capacity.

Thus, after carefully scrutinizing the evidence in the record concerning the action for reimbursement, we find that the evidence supports the trial court's findings of fact, that the findings, in turn, support the trial court's conclusions of law, and the conclusions of law support the order and judgment. Therefore we also affirm the trial court's award of \$14,400.00 as reimbursement to plaintiff by defendant for expenditures made by her in support of the parties' minor child during the three-year period immediately prior to the institution of this action.

Affirmed.

Judges HEDRICK and CLARK concur.

BONE INTERNATIONAL, INC. v. JOHN C. BROOKS

No. 807DC593

(Filed 17 March 1981)

- 1. Principal and Agent § 4; Corporations § 25—knowledge of agency for corporation—choice of dealing with corporation—individual defendant not liable on contract**

Invoices showing that the individual defendant authorized work to be done by plaintiff on trucks which had been transferred to corporate ownership and billing "John C. Brooks, Inc." for the truck repair work established, as a matter of law, knowledge on the part of the agent of the plaintiff who filled out the invoices that defendant's trucking business was being carried on as a corporation and that defendant had authority to act for the corporation, and the knowledge of plaintiff's agent was imputed to plaintiff. Even if the individual defendant was originally a party to the contract for the plaintiff to perform truck repairs, plaintiff's subsequent election to bill

Bone International, Inc. v. Brooks

defendant's corporation for services rendered under the contract would establish an irrevocable choice by plaintiff to deal with the corporation with respect to future performances of the contract, and plaintiff may not now hold the individual defendant personally liable for the truck repairs.

2. Frauds, Statute of § 5— oral promise to answer for debt of another

Any agreement by the individual defendant to pay the debt of a corporation for truck repairs came within the statute of frauds, G.S. 22-1, and was void.

APPEAL by plaintiff from *Harrell, Judge*. Judgment entered 21 April 1980 in District Court, NASH County. Heard in the Court of Appeals 13 January 1981.

Plaintiff alleged in its complaint that pursuant to an express contract with defendant, it had performed service and repair to defendant's trucks on an "open account" basis; that pursuant to the terms of the open account defendant agreed to pay to plaintiff the invoice price for the labor and materials rendered by plaintiff to defendant; and that defendant owed on the account \$4,141.84 with interest from 1 August 1978, for which plaintiff had demanded payment, but which defendant had failed and refused to pay.

Defendant answered by denying the material allegations of the complaint and by alleging that the repair work for which plaintiff had not been paid was improperly done. He also moved to dismiss the complaint on the ground that he was an improper party in the action in that his dealings with plaintiff were within the capacity of agent and employee of John C. Brooks, Incorporated, and not in his individual capacity.

Both parties moved for summary judgment and presented affidavits and exhibits.

Defendant's affidavits tended to show that John C. Brooks incorporated his business on 7 September 1976; that, with the assistance of his attorney, Brooks notified all persons with which he was doing business that his business, which was formerly conducted as a sole proprietorship, was now a corporation; that when title to defendant's trucks was transferred to defendant's corporation it was necessary to notify International Harvester Credit Corporation, whose agent sent a letter confirming the transfer and stating that a copy of said letter was being sent to plaintiff Bone International; that the name

Bone International, Inc. v. Brooks

"John C. Brooks, Inc." was painted on the side of the corporation's trucks; that in business dealings with Bone International since the incorporation, the corporate bills were paid on checks marked "John C. Brooks, Inc."; and that defendant at no time indicated to Bone International "that I was anything but an employee and agent of John C. Brooks, Inc., a North Carolina corporation." Defendant submitted as exhibits: (1) the certificate of incorporation and Articles of Incorporation of John C. Brooks, Inc.; (2) a letter from the operations supervisor for the International Harvester Credit Corporation concerning the transfer of title to defendant's trucks to John C. Brooks, Inc. with the following notation at the bottom of the letter:

"cc:

Bone International - Attention: Dolan Atkinson W.T. Lucas"

(3) several checks on the Peoples Bank & Trust Company account of "John C. Brooks, Inc." which were signed "John C. Brooks," several of which were made out to Bone International; (4) four job tickets from 1976 and 1977 wherein work performed by Bone International was billed to John (or Johnny) C. Brooks, Inc.; (5) and three job tickets from 1978 wherein work performed by Bone International was billed to John C. (or Johnny) Brooks (individually).

Plaintiff's affidavits tend to show that defendant had agreed with plaintiff's president to pay the amount set forth in the complaint, and had at no time during his dealings and discussions with plaintiff's president contended that he did not personally owe the bill; that defendant had written two letters to plaintiff's president wherein he failed to suggest that the bill should have been addressed to the corporation, and one in which he stated he was expecting Bone International to remit to him any remaining amount arising from the sale of one of the trucks; plaintiff had never been informed that any of defendant's trucks had been conveyed to a corporation; and that all business transacted with defendant was transacted in the same manner as all prior business. Plaintiff offered as exhibits the two letters mentioned in its affidavits. The letters contested the accuracy of the bills, whether the defendant had authorized the work, and whether the work was properly performed. Both letters contained demands for remittance to defendant of pro-

Bone International, Inc. v. Brooks

ceeds from the sale of a truck. Both were on plain white paper and signed "John C. Brooks."

Based on the foregoing, the trial judge directed entry of summary judgment for defendant on the grounds that "there is no genuine issue as to any material facts."

Fields, Cooper & Henderson by Milton P. Fields for plaintiff appellant.

Henson, Fuerst & Willey by Thomas W. King for defendant appellee.

CLARK, Judge.

Plaintiff's sole assignment of error is to the granting of summary judgment for the lack of a genuine issue of material fact. In its brief, plaintiff cites authority for a number of general propositions concerning the circumstances under which the granting of summary judgment would be proper. Thus, the following propositions, among others, are urged upon this Court:

1. Upon a motion for summary judgment the court must not attempt to resolve issues of fact but determine whether there is a genuine issue of material fact to be tried. *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *cert. denied*, 292 N.C. 265, 233 S.E. 2d 392 (1977).

2. A motion for directed verdict may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff. *Husketh v. Convenient Systems, Inc.* 295 N.C. 459, 245 S.E. 2d 507 (1978).

3. To determine the sufficiency of the evidence to go to the jury, all the evidence supporting the plaintiff's claim must be taken as true and considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference which may be legitimately drawn therefrom, with contrasts, contradictions, conflicts, and inconsistencies resolved in the plaintiff's favor. *Oliver v. Royall*, 36 N.C. App. 239, 243 S.E. 2d 436 (1978).

4. Judgment as a matter of law is never proper when the facts are in dispute. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297

Bone International, Inc. v. Brooks

(1971); *Jones v. Development Co.*, 16 N.C. App. 80, 191 S.E. 2d 435, cert. denied, 282 N.C. 304, 192 S.E. 2d 194 (1972).

We recognize these propositions as the law in this State, and we will endeavor to apply these principles to the facts presented by plaintiff to determine if they were sufficient to create a genuine issue of material fact.

Plaintiff cites only two opinions to establish the existence of a genuine issue of material fact, *Howell v. Smith*, 258 N.C. 150, 128 S.E. 2d 144 (1962) (Bobbitt, J.), and *Howell v. Smith*, 261 N.C. 256, 134 S.E. 2d 381 (1964) (Sharp, J.). Both opinions deal with the same case. The first reversed the judgment of involuntary nonsuit, concluding that plaintiff had presented a genuine issue of triable fact. The second affirmed a jury verdict in favor of plaintiff. Since both *Howell* opinions deal with the liability of agents for undisclosed principals, we presume that plaintiff considered the defendant in this case to be an agent for an undisclosed principal. Plaintiff is of course wise in seeking to characterize defendant as an agent for an undisclosed principal. Were defendant acting for a disclosed principal, plaintiff would have no case. "An agent who contracts on behalf of a disclosed principal and within the scope of his authority . . . is not personally liable to the other contracting party." *Walston v. Whitley & Co.*, 226 N.C. 537, 540, 39 S.E. 2d 375, 377 (1946); see also *Way v. Ramsey*, 192 N.C. 549, 135 S.E. 454 (1926).

[1] Defendant presented with his affidavits uncontradicted documentary evidence in the form of invoices from plaintiff, which had been marked paid. These invoices, dated 1976 and 1977, showed that, on at least three occasions during those two years, defendant authorized work to be done on the trucks which had by this time been transferred to corporate ownership. The same invoices billed "John C. Brooks, Inc." for the repair work they described. We hold that these invoices establish, as a matter of law, knowledge on the part of the agent of the plaintiff who filled out the invoice that defendant's trucking business was being carried on as a corporation and that defendant had authority to act for the corporation. The knowledge of plaintiff's agent must be imputed to plaintiff. *Bruce v. Casualty Co.*, 127 F. Supp. 124 (E.D.N.C.), *aff'd* 222 F. 2d 642 (4th Cir. 1955); *Wilkins v. Welch*, 179 N.C. 266, 102 S.E. 316 (1920).

Bone International, Inc. v. Brooks

Even if we assume, as plaintiff seems to suggest, that the original agreement was reached between plaintiff and defendant prior to the incorporation of the business, taking defendant "outside the usual rule that an officer of a corporation will not be individually bound when contracting within the scope of his employment as an agent of the corporation," *Howell v. Smith*, 261 N.C. at 260, 134 S.E. 2d at 384, we believe plaintiff is still barred as a matter of law from recovery. Justice Sharp's opinion in the *Howell* case speaks directly to such a circumstance:

"If a third party to a contract involving an undisclosed principal discovers the agency and the identity of the principal while a continuing, divisible contract for the furnishing of goods or supplies is still executory, he then has the option to deal either with the agent or the principal with respect to the future performance of the contract. Ordinarily, *the agent who made the original purchase is not liable if the third party continues to deliver goods after acquiring knowledge of the principal's identity unless he has agreed to be personally liable.*"

Id., 134 S.E. 2d at 385 (Emphasis added). We see no reason in this case to treat a contract for services any differently than a contract for goods, and believe a contract such as plaintiff alleges in its complaint would be divisible so as to bring it within the above rule. We hold that, even if defendant were originally a party to the contract alleged in plaintiff's complaint, plaintiff's subsequent election to bill defendant's corporation for services rendered under the contract would establish an irrevocable choice by plaintiff to deal with the principal with respect to future performances of the contract.

A corporation is an entity separate and apart from its agent. Although this separate entity may be disregarded when a third party who dealt with an agent of the corporation has no way of knowing that a corporation was involved in the transaction, once the third party learns of the corporation's involvement we think it unfair and against sound public policy to allow that third party thereafter to hold liable first the corporation and then the agent at his whim. Upon learning of the corporate involvement, the third party can say to the agent, "You never told me I was dealing with a corporation. I thought I was dealing with you. I will continue to deal with you." The third party

Bone International, Inc. v. Brooks

can also say, "I thought I was dealing with you, but I see now that I was actually dealing with a corporation. Hereafter I will deal with the corporation." What the third party cannot do is say, as plaintiff has attempted here to say, "I thought I was dealing with you, but I see now that I was actually dealing with a corporation. Now that I know this, I will recognize and deal with the corporation, but I will also hold you personally liable for the corporation's debts to me." We hold that plaintiff, having chosen to deal with the corporate entity, may not also now hold defendant personally liable for corporate debts.

[2] The affidavit of plaintiff's president seeks to establish that defendant "agreed to pay the amount set forth in the Complaint." We believe any agreement by defendant to pay the amount in the complaint would fall within the statute of frauds, G.S. 22-1, which states in pertinent part:

"No action shall be brought ... to charge ... any defendant upon a special promise to answer the debt ... of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith"

We have already held that the debt was that of the corporation. Plaintiff's affidavit does not set forth facts "or other circumstances showing that [defendant] has expressly or impliedly incurred or intended to incur personal responsibility" *Walston v. Whitley & Co.*, 226 N.C. at 540, 39 S.E. 2d at 377.

The judgment of the trial court is

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

State v. Easter

STATE OF NORTH CAROLINA v. JERRY LEE EASTER

No. 8026SC804

(Filed 17 March 1981)

Kidnapping § 1.2- sufficiency of evidence

G.S. 14-39(a) authorizes a kidnapping conviction whenever the defendant has committed at least one of the underlying acts of either confinement, restraint, or removal for a proscribed purpose; therefore, defendant could be convicted for kidnapping upon the State's showing that he accompanied the principal during the removal of the victim for the purpose of facilitating the commission of the victim's murder, since the overall circumstances, including defendant's actual presence throughout the entire criminal episode and defendant's handing of guns to the actual perpetrators of the murder, warranted the additional inference that defendant intended to aid and abet the principal by accompanying him.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 21 April 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 January 1981.

Defendant was indicted for the kidnapping and murder of Ethell Wilson. The jury returned a verdict of not guilty as to the murder charge but found defendant guilty of kidnapping. The court imposed a maximum prison sentence of fifty years for the kidnapping conviction.

In pertinent part, the State's evidence tended to show the following. In the winter of 1979, Charles Norwood and Ethell "Slim" Wilson entered into a transaction in which Norwood gave Slim some marijuana to sell in Washington, D.C. The terms of the deal were that Slim was to sell the marijuana on commission and pay Norwood later after it was all sold. Slim subsequently travelled to Washington where he sold the contraband for \$6,000.00. Slim did not, however, intend to keep his part of the bargain to pay for the marijuana because "Norwood had clipped him in Florida and he was not going to give him any (money)."

On 13 July 1979 at 7:00 a.m., Slim and Norwood met at the home of W. James Pearson at 217 Oregon Street in Charlotte, North Carolina. Slim then left to go to his lawyer's office and said he would be back at 7:00 p.m. Slim was driving his green Cadillac.

State v. Easter

At about 11:00 a.m. the same morning, Norwood went to defendant's home and stayed there for about twenty minutes. Defendant and his brother then got in Norwood's pickup truck. A gun was lying on the seat at the time. Norwood drove them back to Oregon Street where he talked briefly with Ronald Tyree Froneberger. Norwood, with the same party, then drove over to a Kentucky Fried Chicken restaurant located about one mile away. Froneberger drove his own car to the place. Slim was already there.

Norwood and Froneberger talked to Slim in the parking lot. Defendant waited. Norwood and Froneberger got into the Cadillac with Slim. Defendant, along with his brother, then got into a maroon car which belonged to Bobby White. Everyone drove back to Oregon Street.

Slim parked his car on the street while Norwood sat opposite to him with a pistol pointed at his temple. Froneberger also had a gun. Slim cried out for help, but Norwood said "I just want my money. That's all I want is my money." Norwood then fastened handcuffs on Slim, took him out of the car and put him in the trunk. Three or four men were standing at the back of the Cadillac while Slim was being forced into the trunk. Defendant went over by the trunk but did not physically assist Norwood. People from the neighborhood were also standing around watching the incident, and several people, including defendant's brother, were looking on from nearby porches.

After Slim was put in the trunk, defendant got in the car with Norwood. Norwood then drove the car to a secluded spot near a vacant house in a wooded area. Joe Chisholm and Larry Adams followed Norwood in another car. After the cars were parked, defendant stood by while Norwood took the license tag off the Cadillac. Larry Adams testified that the following then occurred:

Norwood then told Easter to give Chisholm a gun. Then Norwood said to the man in the trunk, "Your time has come," or something like that. . . . Then Charles (Norwood) opened the trunk . . . and I heard a whole lot of shots.

I saw Norwood and Chisholm holding guns. I can't remember if Easter gave a gun to Norwood or gave it to Chisholm. After the shooting quit, I got up off the ground

State v. Easter

and into Chisholm's car. Easter and Chisholm came to get in Chisholm's car and Charles said something like "He's not dead." So Charles took the other gun from Easter, I turned my head and heard more shots.

Then we left. I don't know where Easter got the gun from that he gave Norwood to do his second set of shooting. There were at least three guns out there at the scene where the shooting occurred.

Chisholm then drove to his house, stopped there a little while, and then drove to Glenwood Drive and let Charles and Easter out. They got out together.

On 21 August 1979, Norwood returned to the scene of the shooting in a rental car. With the assistance of two other men, Norwood set dynamite charges in the Cadillac, which still contained Slim's body, to destroy all of the incriminating evidence. The three men then drove over to Tega Cay, and Norwood, using a beeper communication device, requested the delivery of a red Volkswagen. Defendant, with another man, subsequently delivered the requested vehicle to Tega Cay.

Defendant did not offer any evidence. Nevertheless, the testimony of defendant's brother tended to contradict some of the State's evidence concerning defendant's participation in the confinement and restraint of Slim. Sterling Easter testified that defendant was never near the Cadillac while Slim was being handcuffed and forced into the trunk. He said that defendant was standing on a nearby porch when Norwood "commanded" him to get into the Cadillac and that defendant complied and rode off with Norwood only after some hesitation.

Defendant made a motion to dismiss the charges against him at the close of the State's evidence. It was denied. Defendant now appeals his conviction for the kidnapping of Slim Wilson.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Paul J. Williams, for defendant appellant.

State v. Easter

VAUGHN, Judge.

At the outset, we must cite defendant's counsel for several violations of the Rules of Appellate Procedure. The record on appeal is not organized properly. The judgment and order of commitment, as well as the appeal entries, immediately follow the indictments and precede the summary of the trial proceedings. Each item in the record should be arranged chronologically, in the same order in which it occurred at trial. App. R. 9(b)(4). In addition, counsel reproduced the entire charge to the jury, which covers fifteen typed pages, but he brought forward no assignment of error to a specific portion of those instructions. Thus, one-third of the forty-four page record contains irrelevant and unnecessary matter. App. R. 9(b)(5). Finally, the appropriate assignment of error is not set out in the brief under the issue and argument. App. R. 28(b)(3). We shall, nevertheless, address the merits of this appeal.

Defendant presents a single question for our review: whether the trial court improperly denied his motion to dismiss the kidnapping charge. Defendant essentially makes a two-fold argument: (1) that the crime of kidnapping was complete once the victim was handcuffed and put in the trunk, and defendant could not, therefore, be guilty of aiding and abetting since there was no evidence that he actually assisted Norwood in those acts; and (2) that defendant's mere presence in the car, after the confinement had been accomplished, during Norwood's removal of the victim was insufficient to show that he intended to aid and abet the kidnapping. We disagree.

Defendant's position reveals that he has incorrectly interpreted the leading case of *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). In *Fulcher*, there was ample evidence that defendant had confined and restrained the victims to compel their performance of unnatural sex acts, but there was no showing that defendant had "removed" the victims to facilitate commission of the felonies. The Supreme Court concluded that defendant could, nonetheless, be charged for a violation of G.S. 14-39(a)

State v. Easter

due to his acts of unlawful confinement and restraint alone.¹ "[T]he statute plainly [states] that confinement, restraint, or removal of the victim for any one of the three specified purposes is sufficient to constitute the offense of kidnapping. Thus, no asportation whatever is now required where there is the requisite confinement or restraint." 294 N.C. at 522, 243 S.E. 2d at 351. Thus, the Court merely enforced the legislature's use of disjunctive terms to define the prohibited forms of conduct in the new statute. See Note, Kidnapping in North Carolina — A Statutory Definition for the Offense, 12 Wake Forest L. Rev. 434, 439 & nn. 39-40 (1976).

It is obvious that *Fulcher*, *supra*, did not hold as defendant seems to assert, that the crime of kidnapping is always complete once the confinement or restraint of the victim is accomplished or that the act of removal, by itself, for a proscribed purpose is insufficient to sustain a conviction. Moreover, the case of *State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980) expressly repudiates defendant's construction of G.S. 14-39. In *Adams*, the defendant was convicted of second degree rape, kidnapping and two counts of crime against nature. On appeal, he contended that the verdict of kidnapping could not be sustained because the element of restraint was also an inherent, inevitable feature of the sexual crimes. The Court, however, rejected defendant's reliance on *Fulcher*, *supra*:

We adhere to the principle quoted from *Fulcher*. However, in the case at hand the state showed not only a restraint of the victim but that there was an asportation, that she was removed from one place to another without her consent. She testified that she was on the street near the front of the home intending to go to Mrs. Talley's home and that she unwillingly went to and entered her own home

1. Prior to 1975, the elements of kidnapping were not defined by statute in this State. See G.S. 14-39(1933). Thus, our courts applied the common law definition of the offense which required both an unlawful detention and a carrying away of the victim. See *State v. England*, 278 N.C. 42, 50-51, 178 S.E. 2d 577, 582-83 (1971). The legislature, however, rewrote G.S. 14-39 in 1975 to include a statutory definition of the substantive elements of kidnapping. The new statute provides that "[a]ny person who shall unlawfully confine, restrain or remove from one place to another, any other person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of: . . . (2) Facilitating the commission of any felony. . . ." G.S. 14-39(a) (1975) (subsections 1 and 3 omitted).

State v. Easter

because defendant threatened to blow her brains out. Defendant admitted that he told her she was not "going any place."

. . . .

We hold that the showing of asportation in the case at hand was sufficient to support the verdict finding defendant guilty of kidnapping.

299 N.C. at 705-06, 264 S.E. 2d at 50.

In sum, we conclude that the plain wording of G.S. 14-39(a) authorizes a kidnapping conviction whenever the defendant has committed at least *one* of the underlying acts of either confinement, restraint or removal for a proscribed purpose. *See State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980); *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980); *State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979); *State v. Martin*, 47 N.C. App. 223, 267 S.E. 2d 35 (1980); *State v. Sampson*, 34 N.C. App. 305, 237 S.E. 2d 883 (1977), *review denied*, 294 N.C. 185, 241 S.E. 2d 520 (1978). Thus, in the instant case, it is clear that defendant could indeed be convicted for kidnapping upon the State's showing that he accompanied Norwood during the removal of the victim (for the purpose of facilitating the commission of the murder), if the overall circumstances warranted the additional inference that defendant intended to aid and abet Norwood by doing so. We are not, however, convinced that the State's evidence failed to show defendant's participation in the confinement and restraint of the victim as well.

It is axiomatic that a motion to dismiss a criminal charge should only be granted when the State fails to present substantial evidence of the material elements of the crime charged, viewing all the evidence in the light most favorable to the State with the benefit of every reasonable inference arising therefrom. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Avery*, 48 N.C. App. 675, 269 S.E. 2d 708 (1980). More particularly, when the premise of a defendant's criminal liability is that he aided and abetted another in the commission of certain proscribed acts, the State's evidence must show the existence of three material elements: (1) defendant's actual or constructive presence during the commission of the criminal acts; (2) defendant's intent to aid in the commission of the

State v. Easter

offense, if it should become necessary; and (3) the communication of defendant's intent to render assistance to the actual perpetrator. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976); *State v. Edwards*, _____ N.C. App. _____, 272 S.E. 2d 384 (1980). *See also State v. Small*, _____ N.C. _____, 272 S.E. 2d 128 (1980); *State v. Davis*, 301 N.C. 394, 271 S.E. 2d 263 (1980). Applying these principles in the instant case, we hold that the evidence passes the test of sufficiency required to withstand a motion to dismiss, in that the jury could reasonably infer defendant's guilty participation in the kidnapping of Slim Wilson. *See State v. Bright*, 301 N.C. 243, 257, 271 S.E. 2d 368, 377 (1980).

The State's evidence showed that defendant rode around with Norwood in his pickup truck until they found Slim at a restaurant. Defendant waited while Norwood confronted Slim and then followed Norwood back to Mr. Pearson's house on Oregon Street in a different car. Defendant stood by the Cadillac while Norwood held a pistol to Slim's head and handcuffed him. Defendant also went over by the trunk while Slim was being physically forced into the trunk of his own car. After Slim was securely confined, defendant again rode off with Norwood, followed by others, to a wooded area where Slim was shot. Though defendant did not actually fire shots at Slim, he did assist the perpetrators by handing them two guns. Later, Norwood and defendant returned together to Bobby White's house.

We believe that defendant's actual presence throughout this entire criminal episode, from its beginning to its end, established the necessary elements for his conviction for aiding and abetting the kidnapping. His continual presence indicated his intent to render assistance, if it became necessary at any stage of the plot, and also effectively communicated his willingness to aid to Norwood. We also hold that, viewed in the light most favorable to the State, the evidence of defendant's presence during the removal of the confined victim (by itself) provided an adequate basis for the jury to infer his intent to aid in the kidnapping. *See State v. Adams, supra*, 299 N.C. 699, 264 S.E. 2d 46 (1980).

In conclusion, the jury could reasonably find defendant's complicity in a continuous series of criminal actions, including the confinement, restraint and removal of the victim, which

Norman v. Banasik

enabled the principal actor to fulfill his murderous design. The case was, therefore, properly submitted to the jury.

No error.

Chief Judge MORRIS and Judge BECTON concur.

**RUSSELL NORMAN v. RICK BANASIK D/B/A THE MOTOR WORKS AND
OHIO CASUALTY INSURANCE COMPANY**

No. 8021DC635

(Filed 17 March 1981)

Insurance § 142—burglary and theft policy — failure to show entry or exit by force and violence

Insured's evidence was insufficient to show a theft by burglary within the meaning of an insurance policy which required proof of entry or exit by force and violence either by visible marks made by tools, explosives, electricity or chemicals, or by physical damage to the premises at the point of entry or exit, where insured's evidence showed only that mortar dust on the floor next to the sliding door at the rear of insured's garage had been disturbed and that a bolt had been unscrewed and removed from a metal plate in the floor which guided and held the door so that the plate would swivel and permit the door to be pulled inward between a foot and eighteen inches.

Judge HEDRICK dissenting.

APPEAL by defendant Banasik from *Keiger, Judge*. Judgment entered 17 January 1980 in District Court, FORSYTH County. Heard in the Court of Appeals 15 January 1981.

Plaintiff instituted this action against his employer, Banasik, and his employer's insurer, Ohio Casualty Insurance Company, for the loss of his mechanic's tools. The tools were apparently stolen from the employer's place of business on the night or morning of 1-2 December 1978. Employer Banasik brought a cross-claim against codefendant Ohio Casualty for the value of all tools, parts, and equipment found missing on the morning of 2 December 1978, including those of the plaintiff.

Ohio Casualty pled as an affirmative defense, to both the claim of plaintiff Norman and the cross-claim of codefendant Banasik, that the only theft loss against which it had insured

Norman v. Banasik

Banasik was burglary, burglary being defined in the policy as follows:

“ ‘Burglary’ means the felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity, or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry, or (2) from within a showcase or show window outside the premises by a person making felonious entry into such showcase or show window by actual force and violence, of which force and violence there are visible marks thereon, or (3) from within the premises by a person making felonious exit therefrom by actual force and violence *as evidenced by visible marks* made by tools, explosives, electricity or chemicals upon, *or physical damage* to the interior of the premises at the place of such exit.” [Emphasis added.]

Ohio Casualty’s motion for summary judgment was denied.

At trial the evidence presented by plaintiff and defendant Banasik tended to show the following: On the morning of 2 December 1978, Robert Banasik, a Motor Works employee, arrived at defendant Rick Banasik’s place of business. He noticed that the front door was closed, but unlocked. When he entered the building, he found various tools and other items in disarray and that several items were missing. He telephoned the police and later his brother, Rick Banasik. When defendant Banasik arrived, police officer Smith had already made a preliminary investigation, which failed to produce significant clues as to how the break-in had occurred. There were no visible signs of tampering with the front door locking mechanism, nor were any windows broken. After the officer left, Rick Banasik continued to explore the building; as he approached the large sliding door at the rear of the garage, he noticed that some mortar dust on the floor next to the door had been disturbed. His attention having been drawn to the spot, he then discovered that a bolt was missing from an L-shaped metal plate attached to the floor by bolts at the lower left-hand corner of the doorway. He found the bolt lying several feet away. The function of the plate is to help secure the door, to guide it, and to keep it from being

Norman v. Banasik

pushed or pulled inward. With the bolt missing, the plate would swivel on the remaining bolt, which would allow the door to be pulled inward between one foot and eighteen inches. When Banasik had closed the shop the previous evening, the bolt and plate had been secure.

Approximately \$4,000 worth of hand tools, items of equipment, and auto parts were stolen. All of these were small enough to be taken through the opening created by pulling the rear door inward; in addition, a person could crawl through the opening, as Banasik succeeded in doing that day.

At the close of plaintiff's evidence, defendant Banasik moved for a directed verdict against the plaintiff on the issue of his negligence. The motion was granted; therefore, neither that issue nor plaintiff himself is directly involved in this appeal. At the close of defendant Banasik's evidence, codefendant Ohio Casualty moved for directed verdict against the other parties. This motion was granted "on the ground of the insufficiency of the evidence to show a 'burglary' within the policy definition ..." from which ruling defendant Banasik appeals.

William B. Gibson for defendant appellant Banasik.

Hudson, Petree, Stockton, Stockton & Robinson by W. Thompson Comerford, Jr. and William A. Brafford for defendant appellee, Ohio Casualty Insurance Company.

CLARK, Judge.

Appellant's single assignment of error is to the granting of directed verdict for appellee. The trial court ruled that the evidence, taken in the light most favorable to appellant, was insufficient to permit twelve reasonable jurors to find that a burglary, *as defined by the policy of insurance*, in fact occurred. We agree.

The policy definition of "burglary" appears to be a standard provision in burglary policies and the provision has been previously explained and interpreted as follows:

"It is not uncommon for insurance companies to include in their burglary or theft policies a provision that there must exist visible marks or visible evidence of force and violence in effecting a felonious entry. Such a provision is inserted for the protection of the insurer against fraud

Norman v. Banasik

and false claims, and clearly favors the insurer over the insured. However, since such provisions are not ambiguous, the rule requiring construction in favor of the insured does not apply. . . . And, although the policy in suit contains a provision relative to an exit by force and violence, the same general principles apply, and the words of the provision being unambiguous, should be accorded their ordinary meaning.

We hold that clause 2(b)(3) quoted above reasonably means that the plaintiff must show exit by force and violence either by *visible marks made by tools, etc.*, or by *physical damage* to the interior of the premises."

Clemmons v. Insurance Co., 2 N.C. App. 479, 482, 163 S.E. 2d 425, 427 (1968). There is no evidence of any marks on the outside of the building. The only evidence of any entry signs on the inside the building, was that dust had been swept away. This could have occurred in any number of ways and certainly would not support an inference that the disturbance of the dust was a "visible [mark] made by tools, explosives, electricity or chemicals" See policy language quoted *supra*.

The only other means available to appellant of establishing entry or exit by force and violence would be to argue, as he does, that the removal of the bolt from the plate in the floor constituted "physical damage to the interior of the premises at the place of such exit." *Id.* Under the circumstances of this case, we fail to see how removal of the bolt, so that the back door would partially open, constituted physical damage to the premises any more than did picking the lock so that the front door would open. Appellant's testimony tended to show that the bolt was simply screwed out of the lag with a wrench, as any threaded device is designed to do, not ripped up from the floor. Appellant testified that he replaced the bolt and then welded the bolt head to the plate, not because the bolt had been damaged and welding was necessary to repair it, but "so that nobody could take a wrench and unscrew the bolt back out of the lags in the floor." The evidence establishes that appellant was able to return the bolt/plate configuration to its prior condition by simply screwing the bolt back into the lag from which it had been unscrewed. Unscrewing the bolt and pivoting the plate obviously damaged neither, or they would have required some repair before the

Norman v. Banasik

bolt/plate configuration could be replaced. Appellant has not alleged that there were any marks on the plate or the bolt. Appellant thus fails to establish a prima facie case for recovering under the contract by failing to produce any evidence of "visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to the interior of the premises as the place of such exit."

The trial court's entry of directed verdict is

Affirmed.

Judge MARTIN (Robert M.) concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting:

While I agree that unambiguous provisions in an insurance policy must be construed in favor of the insurer, the evidence, upon a motion for a directed verdict, must be considered in the light most favorable to the party with the burden of proof, and such party is entitled to every inference reasonably deducible therefrom. The majority seems to have considered the evidence in its light most favorable to the insurer.

In my opinion, when the evidence is construed in the light most favorable to defendant Banasik, it reveals an entirely different picture from that of the majority. Plaintiff Norman testified as follows:

I saw that a piece of steel at the back door was broken loose where somebody had knocked it loose and come in the back door. That's how I assumed the thieves had gotten in. The door had been pushed open, and the piece of metal had been knocked back. I didn't see any evidence of damage to the outside of the door. I wasn't really worried about it though; I knew my tools were gone and that is what I was concerned about.

Defendant Banasik testified as follows:

This is a pretty old building and the mortar between the bricks, the dust falls out of the mortar and down along the door behind the plate. I noticed that it looked like somebody had taken a broom or their hand and swished the dust, just

Norman v. Banasik

kind of swept the dust aside. I saw that one of the bolts was missing and several feet away from where these bolts had been in the floor one of these bolts was lying underneath the car that was parked next to the door. I observed that with just one bolt in the plate, the plate could swivel like this and I could pull the door open; I could move the bottom of the door between a foot and eighteen inches.

That day I took the bolt that I had found underneath the car and *rammed* it back into the floor and took a torch and welded the heads of the bolts to the plate so that nobody could take a wrench and unscrew the bolts back out of the lags in the floor.

. . .

The plate-door system the previous Friday evening when I closed the business had all been secured. The Saturday morning when I came in there and found the bolt missing, when I opened the door and closed the door a couple of times, the plate was bouncing back and forth off the wall and I'd surely have noticed that Friday night when I locked up the place.

. . .

On that Saturday morning, I pulled the rear door back; the door came out twelve to eighteen inches, large enough for tires to go out the back door, large enough for a person to go out the back door. I slipped through the hole to see if it could be done.

. . .

The plate was pretty much in place; the end where the bolt was missing was cocked out a little bit. In order to allow the foot or eighteen inches of clearance, the plate moves clear out of the way. . . .

When I noticed that the bolt was missing, the plate was cocked over such that the bolt would not have gone down back into the lag in the floor. . . .

I welded those lag bolts so they couldn't be *wrenched out again* on the day of the burglary, about 10:30, 11:00. . . .

Uniform Service v. Bynum International, Inc.

There is a few inches clearance between the steel plate as it fits up against the sliding door and the wall; there is a few inches play between the plate and the door. From the outside of the door to this bolt, I tried it and I can get my hand through the clearance between the door and the wall and I can take a wrench or an extension of some sort and get to it. It requires some contortion, but it can be done.

[Emphasis added.]

In my opinion, the above-quoted evidence clearly distinguishes the present case from *Clemmons v. Glens Falls Insurance Co.*, 2 N.C. App. 479, 163 S.E. 2d 425 (1968). Additionally, in my opinion, the above-quoted evidence is sufficient to raise an inference that the premises were entered by "force and violence." One inference reasonably deducible from this evidence is that a burglar pushed upon the back door from the outside, reached in with "a wrench or an extension of some sort," and "wrenched" the bolt out of the plate, allowing the plate mechanism to swivel and the door to be forced open enough to enable the burglar to enter. The manner of the bolt's removal is of less significance than the fact that the bolt was removed. In this regard, I find the case *sub judice* clearly distinguishable from *Clemmons v. Glens Falls Insurance Co.*, *supra*, where the evidence merely tended to show that the window had been unlatched.

In *Clemmons v. Glens Falls Insurance Co.*, *supra*, unlike the instant case, the evidence simply did not show entry by force and violence. As pointed out by the majority, the purpose of the provision in the policy is to prevent fraudulent claims. I vote to reverse the directed verdict for defendant Ohio Casualty Insurance Company.

RENTAL TOWEL AND UNIFORM SERVICE v. BYNUM
INTERNATIONAL, INC.

No. 8012DC645

(Filed 17 March 1981)

Contracts § 28—breach of contract action — instructions improper

In an action to recover damages for breach of a contract under which plaintiff supplied uniforms for defendant's employees, evidence was suffi-

Uniform Service v. Bynum International, Inc.

cient to raise a question for the jury as to whether the parties intended to enter into a thirty month contract or whether they intended to enter a contract for a renewal term, and the trial court erred in failing to so instruct the jury.

Judge CLARK dissenting.

APPEAL by defendant from *Cherry, Judge*. Judgment entered 18 March 1980 in District Court, CUMBERLAND County. Heard in the Court of Appeals 3 February 1981.

This is a civil action wherein plaintiff seeks to recover damages for breach of a contract under which plaintiff supplied uniforms for defendant's employees. In its complaint dated 9 August 1979, plaintiff, *inter alia*, alleged that on 8 November 1978 it and defendant entered into a contract for uniform rental at an agreed price to run for thirty months from the installation date of 11 December 1978; that defendant breached this contract on or about 29 May 1979 by informing plaintiff to retrieve its uniforms and discontinue future service; and that plaintiff was therefore entitled to liquidated damages under the contract of \$3,276.44. Defendant answered 3 October 1979, denying the material allegations of the complaint and further alleging in a counterclaim that on or about 16 October 1978 plaintiff and defendant renewed an existing contract for uniform rental with the term of this "renewal contract" to be one year, and that defendant should recover \$1,000 from plaintiff for tendering non-conforming goods under this contract. Plaintiff replied 4 October 1979 denying the material allegations of the counterclaim.

At trial, plaintiff offered a paper writing entitled "Rental Service Agreement" which contained the signature of John W. Miller, the general manager of plaintiff, dated 8 November 1978, and the signature of Richard F. Bynum, the president of defendant. Miller testified that plaintiff and defendant had been doing business under a contract which began in 1976, and that this prior contract had expired and the parties "were in the process of renegotiating a new contract." Miller also testified that he received the paper writing noted above on 8 November 1978. The document had been signed by Bynum, and the date "10/16/78" was written in the blank labelled "renewal," while nothing appeared in the blank labelled "installation date." Since it was Miller's understanding that the date 16 October

Uniform Service v. Bynum International, Inc.

1978 represented the date Bynum had signed the contract, and since plaintiff's "standard process" was to "put the customer number in the blank that said renewal," Miller struck out the date "10/16/78" in the blank labelled "renewal" and wrote in defendant's "identification number." Miller then inserted the date "12/11/78" in the blank labelled "installation date," and signed and dated the document. Although the "normal procedure" was to deliver a copy of the document to the customer, Miller could not locate or recall what happened to defendant's copy. Plaintiff ordered new uniforms for defendant "[u]pon the entry into this contract" and the first delivery of these uniforms occurred on 11 December 1978. Uniforms were delivered to and paid for by defendant for several months.

Two other employees of plaintiff, Larry A. Vetter, a route salesman, and Stanley Willis, a route supervisor, testified as to Bynum's expressing dissatisfaction sometime in late May 1979 as to short sleeve shirts that were delivered beginning about 15 May 1979. Bynum wanted new shirts, which plaintiff ordered, received, and had ready to deliver some two weeks thereafter. Vetter made the "final pickup" of uniforms from defendant on 23 July 1979.

Defendant offered the testimony of Bynum that defendant had rented towels and uniforms from plaintiff since 1976 and that about October, 1978, Bynum "had a conversation with one of the plaintiff's representatives concerning new uniforms." The representative told Bynum that he would have to sign a "renewal agreement" before he could receive new uniforms. Bynum admitted signing the paper writing offered by plaintiff but he testified that "it had been changed since I signed it." He testified that "[t]he renewal date has been struck out and our former contract number has been inserted in the renewal blank. Also, there is a date written in the blank for the installation date and it has been signed by Mr. Miller." Bynum did not see the paper writing "as it now appears" until plaintiff's representatives, including Miller, came to see Bynum about defendant's discontinuation of service. Though Bynum testified that he was "not surprised to see the installation date because I knew they could not install the uniforms on the same day that I ordered them," Bynum did not understand that the agreement was to run for thirty months from the installation date. Bynum was not aware that paragraph two of the document provided

Uniform Service v. Bynum International, Inc.

that the agreement was to continue for thirty months from the installation date since he "signed the contract as a renewal." His interpretation of the paper writing was that the agreement was to be for twelve months. At the close of all the evidence, the court granted plaintiff's motion for a directed verdict on defendant's counterclaim and submitted the following issues to the jury, which were answered as indicated:

(1) Did the parties intend to enter into a contract to become effective on the installation date of December 11, 1978, with the terms of the contract to be as set forth in Paragraph Two (2) of the contract?

Yes: X No

(2) Did the defendant, Bynum International, Inc. breach the contract?

Yes: X No

From a judgment entered on the verdict that plaintiff have and recover of defendant \$3,276.44 as liquidated damages, and from a judgment directing a verdict for plaintiff on defendant's counterclaim, defendant appealed.

H. Gerald Beaver, for the plaintiff appellee.

Bowen & Lytch, by Benjamin N. Thompson, for the defendant appellant.

HEDRICK, Judge.

It is the duty of the trial judge to declare and explain the law arising on the evidence given in the case. G.S. § 1A-1, Rule 51(a); *N.C. Board of Transportation v. Rand*, 299 N.C. 476, 263 S.E. 2d 565 (1980); *Rector v. James*, 41 N.C. App. 267, 254 S.E. 2d 633 (1979). This means, among other things, that the judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings and the evidence. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Howell v. Howell*, 24 N.C. App. 127, 210 S.E. 2d 216 (1974). See also G.S. § 1A-1, Rule 49(b). See, generally, *Harrison v. McLearn*, 49 N.C. App. 121, 270 S.E. 2d 577 (1980).

Paragraph two of the paper writing admittedly executed by plaintiff and defendant in pertinent part provides:

Uniform Service v. Bynum International, Inc.

2. TERM OF AGREEMENT: In consideration of the substantial investment by RENTAL [plaintiff] in merchandise and equipment to provide service to CUSTOMER [defendant], this Agreement shall continue for thirty (30) months from the installation date, and shall continue from year to year thereafter, provided it is not terminated by either party by written notice to the other at least sixty (60) days prior to the expiration of the initial term or any renewal term. . . .

. . . .

If the CUSTOMER fails to comply with this Agreement, or if the CUSTOMER elects to terminate it for any reason prior to the expiration of the term above stated, the CUSTOMER will pay RENTAL as liquidated charges, an amount equal to one-half of the total regular weekly rental multiplied by the number of weeks remaining in the term, plus the current replacement value of any garments not returned to RENTAL.

The evidence is sufficient to raise an inference that the parties intended to enter into a thirty month contract. However, we believe that the evidence is also sufficient to raise an inference that the parties intended to enter into a contract for a renewal term. The paper writing (plaintiff's Exhibit No. 1), admittedly executed by both parties, refers to an original contract to be effective for thirty months from the "installation date," but the same paper writing also refers to a "renewal" agreement. We think it significant that plaintiff's Exhibit No. 1, the contract form used by the parties, contained in the upper right hand corner the word "renewal" with a blank to be filled in, and the words "installation date" with a blank to be filled in. Defendant's president, Bynum, testified that the blank beside the word "renewal" had already been filled in with the date "10/16/78" when he executed the agreement. Plaintiff's general manager, Miller, testified that when he received the agreement executed by defendant he personally struck out the date "10/16/78" and filled in the blank beside the words "installation date" with the date "12-11-78." When the testimony of defendant's president is considered together with plaintiff's Exhibit No. 1, we are of the opinion that the evidence raises the inference sufficient to be submitted to the jury that defendant intended

Uniform Service v. Bynum International, Inc.

only to enter into a contract for a renewal term. Therefore, the only controversy raised by the evidence is whether the parties intended to enter a thirty month contract, or whether they intended to enter a contract for a renewal term.

The first issue submitted to the jury, in our opinion, does not resolve the controversy between the parties. This issue refers to a contract "to become effective on the installation date of December 11th, 1978, with the terms of the contract to be as set forth in paragraph two (2) of the contract." The provisions of paragraph two of plaintiff's Exhibit No. 1 refer to the "installation date" only as the beginning point of a full thirty month contract, and not as the beginning point of any renewal term. Thus, the issue submitted precludes any consideration by the jury that the parties intended to enter into a contract for a renewal term.

In order to resolve the controversy raised by the evidence, the jury must be given the opportunity to determine (1) whether the parties intended to enter into a thirty month contract, and (2) whether the parties intended to enter a contract for a renewal term. If the jury answers the first issue yes, there would be no necessity to answer the second issue, but if the jury answers the first issue no, it must answer the second issue. There is no controversy that defendant breached the contract, and there would be no necessity to submit such an issue. Whichever issue the jury answers in the affirmative, the court can calculate the damages from paragraph two of plaintiff's Exhibit No. 1.

Because of the error in the submission of an improper issue, there must be a new trial with respect to plaintiff's claim. Since no error has been assigned by defendant to the portion of the judgment directing a verdict for plaintiff with respect to defendant's counterclaim, that portion of the judgment will be affirmed.

New trial in part; affirmed in part.

Judge MARTIN (Robert M.) concurs.

Judge CLARK dissents.

Judge CLARK dissenting:

State v. Grier

I see no reason to disturb the award of \$3,276.44 to the plaintiff after jury trial in the District Court.

The plaintiff alleged and offered evidence tending to show a renegotiated new contract to cover a period of 30 months, as provided in Paragraph 2 of the printed contract. Defendant in his answer denied the new 30-month contract. Defendant also counterclaimed, alleging a renewal contract for a period of 12 months, and a breach by plaintiff, but the trial court directed a verdict for plaintiff on defendant's counterclaim, and defendant did not contest the ruling on appeal. Under the circumstances the issues submitted were properly raised by the pleadings and the evidence and were sufficient to resolve all material controversies between the parties.

The two issues proposed by the majority were not necessary, and the second issue submitted in this case was raised by defendant's evidence of the failure to deliver the uniforms in apt time.

I vote to affirm.

STATE OF NORTH CAROLINA v. DOROTHY GRIER

No. 8019SC767

(Filed 17 March 1981)

1. Criminal Law § 7.1— entrapment — question for jury

The evidence in a prosecution for possession and sale of cocaine did not show entrapment as a matter of law but presented a question of entrapment for the jury where the State's evidence tended to show that defendant produced quantities of cocaine for an undercover agent to purchase, defendant was actually the first one to raise the issue of a drug purchase, defendant knew exactly where to go and whom to see in order to make a drug purchase, and other people who frequented defendant's home looked upon her as one familiar with drug trafficking in the area, and where defendant's evidence tended to show that the undercover agent knew defendant was unemployed and in need of money, he offered financial assistance to fix her car and leaky basement, he often brought beer, food, and cigarettes for her as gifts, the undercover agent was the first one to raise the subject of a drug transaction, the undercover agent provided defendant with all the money for the drugs purchased and drove her on each of the three occasions in question to buy the drugs, and defendant did not profit on any of the three purchases.

State v. Grier

2. Criminal Law § 73.2– question by third person to defendant not hearsay

In a prosecution for possession and sale of cocaine, testimony by an undercover agent that a third person asked defendant if she knew where he could get “some coke” was not hearsay and was properly admitted since it was not offered to prove the truth of the matter asserted but was offered merely to show that the statement was made by the third person and that the undercover agent was not the first to raise the subject of a drug transaction with defendant.

3. Criminal Law § 101– failure to instruct jury before recess – absence of prejudice

The trial court properly denied defendant’s motion for a mistrial because of the court’s failure to instruct the jury prior to a lunch recess not to discuss the case where no evidence of juror misconduct appears in the record, and where defendant made no objection to the court’s failure to instruct at the time of recess and made no request that the court conduct an examination of the jurors concerning their activities during the recess.

4. Criminal Law § 88– refusal to permit defendant to explain answer on cross-examination

In a prosecution for possession and sale of cocaine, the trial court did not abuse its discretion in refusing to permit defendant to explain one of her answers on cross-examination concerning the presence of a reputed cocaine dealer in the courtroom where defendant had every opportunity on redirect examination to explain the presence of such a person in the courtroom and her relationship, if any, with him.

APPEAL by defendant from *Albright, Judge*. Judgment entered 10 April 1980 in Superior Court, CABARRUS County. Heard in the Court of Appeals 23 January 1981.

Defendant was indicted and convicted on three counts of possession of cocaine with intent to sell and deliver and three counts of sale of cocaine.

The State presented sufficient evidence to support each of the charges against the defendant. While not denying the possession and sale of cocaine, defendant Grier argues that the actions of the State’s undercover agent, George T. Arnold, III, constituted entrapment. The only witnesses in the trial were the undercover agent for the State and the defendant, Dorothy Grier, in her own defense.

For the State, agent Arnold testified that he met Ms. Grier in the course of an undercover investigation through the son of Ms. Grier’s former boyfriend. From mid-December 1979 through January 1980, Arnold visited Ms. Grier’s home on

State v. Grier

numerous occasions. On several of these visits, Arnold ate meals with Ms. Grier and played cards with her and her friends. Beginning in mid-January, Arnold and Ms. Grier discussed the availability of various illegal drugs in the Kannapolis area. Arnold testified that Ms. Grier approached him at her home about the 16th of January and asked if he was looking for drugs. They had never before discussed the possibility of a drug transaction. On 24 January 1980 and on 25 January 1980, Ms. Grier produced varying quantities of cocaine for Arnold to purchase.

In defense, Ms. Grier testified that Arnold would frequently bring beer and food to the house for her, her friends, and her grandson. She said that Arnold was aware of some financial troubles that she was experiencing and offered to help her fix her broken-down car and leaky basement. Ms. Grier contended that it was Arnold who first brought up the subject of a drug transaction; that Arnold supplied her with the money to purchase the drugs; and that Arnold drove her in his car each time to pick up the drugs. Additionally, Ms. Grier testified that she made no profit from any of the three sales. Evidence was also elicited on cross examination of Arnold that he never saw any illegal drugs at Ms. Grier's home except on the three occasions that are the subject of this appeal.

The defendant argues that these efforts by agent Arnold to ingratiate himself with her and to induce her to commit these crimes constitute entrapment and bar any conviction for the crimes committed.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the State.

Cecil R. Jenkins, Jr. for the defendant appellant.

BECTON, Judge.

[1] Defendant's fourth assignment of error, and the main focus of her appeal, is that the trial judge committed reversible error by not directing a verdict for defendant at the close of the evidence. The defendant argues that the evidence presented shows that agent Arnold's activities constituted entrapment as a matter of law and that Arnold induced her into criminal action at a time when she was in no way predisposed to criminality.

State v. Grier

The defense of entrapment requires proof of two essential elements:

- (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, [and]
- (2) ... the criminal design originated in the minds of the government officials, rather than the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

State v. Walker, 295 N.C. 510, 513, 246 S.E. 2d 748, 750 (1978); see also *Sherman v. United States*, 356 U.S. 369 (1958). Like other defenses, entrapment is generally an issue for the jury to decide unless the court finds from the evidence presented that the police entrapped the defendant as a matter of law.

The leading North Carolina case on the subject of entrapment is *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975) in which the Supreme Court adopted the following standard:

The court can find entrapment as a matter of law *only where the undisputed testimony and required inferences compel a finding* that the defendant was lured by the officers into an action he was not predisposed to take. (Emphasis added.)

Id. at 32, 215 S.E. 2d at 597, quoting *State v. Campbell*, 110 N.H. 238, 265 A2d 11 (1970); see also *Sorrells v. United States*, 287 U.S. 435 (1932). It is clear from the record that the evidence presented concerning entrapment and the defendant's predisposition to criminal activity was in conflict.

The State's evidence tended to show that the defendant was actually the first one to raise the issue of a drug purchase; that she knew exactly where to go and who to see in order to make a drug purchase; and that other people who frequented her home looked upon Ms. Grier as one familiar with drug trafficking in Kannapolis.

Defendant's evidence tended to show that Arnold knew Ms. Grier was unemployed and in need of money; that he offered financial assistance to fix her car and leaky basement; and that he often brought beer, food and cigarettes for her as gifts.

State v. Grier

Moreover, she testified that Arnold was the first one to raise the subject of a drug transaction; that he provided her with all the money for the drugs purchased; that he drove her on each of the three occasions in question to buy the drugs; and that she did not profit on any of the three purchases.

The evidence presented raises a classic conflict and illustrates that the defense of entrapment was very much in dispute. Since evidence of entrapment must be uncontradicted in order for the judge to take the issue from the jury, the trial judge acted properly in charging the jury on the defense and leaving it to their determination as an issue of fact.

[2] Defendant also assigns as error the admission into evidence of a statement allegedly made by Leonard Parks which was testified to by agent Arnold. The record reveals the following from the examination of Arnold by the State:

Q. Now, going back to the conversation you had with Ms. Grier and Leonard Parks (or Leonard Durrand), before you went over to Yale and Princeton Street, what did Leonard Parks, (Leonard Durrand), say? What occurred in that conversation?

MR. JENKINS: Object.

THE COURT: OVERRULED.

A. Mr. Parks said, "Dot, do you know where I can get some coke?"

MR. JENKINS: OBJECTION and MOVE TO STRIKE.

THE COURT: DENIED.

Defendant argues that the answer is excludable hearsay, and its admission violated her right to confrontation and cross examination. The statement reflected directly on the defendant's predisposition to sell cocaine, defendant contends, and its admission seriously undermined her defense of entrapment and constituted prejudicial error entitling her to a new trial. We disagree.

It is universally accepted that the testimony by a witness of what another person said is inadmissible hearsay if it is offered into evidence to prove the truth of the matter being asserted.

State v. Grier

State v. Griffis, 25 N.C. 504 (1843); 1 Stansbury, N.C. Evidence § 138 (2d ed. Brandis Revision 1973); Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence*, 34 N.C.L. Rev. 171, 178-80 (1956). A statement is not hearsay, however, if it is offered into evidence for some purpose other than to establish the truth of the statement itself. 1 Stansbury, *supra*, at §§ 138 & 141. Notable examples of admissible non-hearsay include statements which are offered to prove only that the statement was actually made, *Wilson v. Indemnity Corp.*, 272 N.C. 183, 158 S.E. 2d 1 (1967), *State v. Brockenborough*, 45 N.C. App. 121, 262 S.E. 2d 330 (1980); statements offered to establish the state of mind of another person hearing the statement, 1 Stansbury, *supra*, at § 141 n.35; and statements offered to show the presence or lack of an emotion which would naturally result from hearing the statement, 1 Stansbury, *supra*, at § 141 n.37.

The State argues that the testimony of agent Arnold was offered merely to show that the statement was made by Leonard Parks and to show that Arnold was not the first to raise the subject of a drug transaction. The State's arguments are consistent with the law in North Carolina, and as such, the statement made by Parks was not hearsay. The court ruled properly on the statement's admissibility.

[3] We turn now to defendant's next assignment of error that the "trial court erred in denying the defendant's motion for a mistrial for failure of the trial judge to give proper instructions to the jury before it dismissed for lunch."

While the North Carolina Supreme Court has held that it is the better practice to instruct the jury prior to each recess not to discuss the case, *State v. Frazier*, 280 N.C. 181, 196, 185 S.E. 2d 652 (1972), the defendant must present some evidence of juror misconduct before a mistrial may be declared. Defendant argues that a "probability of substantial prejudice to the defendant" arose from the court's failure to instruct. (Emphasis added.) The defendant offers no evidence, however, of any misconduct. Additionally, the defendant did not object to the judge's failure to instruct at the time of the recess nor did the defendant request that the judge conduct an examination of the jurors concerning their activities during the recess. Because no evidence of jury misconduct appears in the record, the

Yelverton v. Furniture Industries

trial judge's failure to instruct the jury prior to the recess did not constitute an abuse of discretion warranting a mistrial.

[4] Defendant's next assignment of error involves the refusal of the judge to let the defendant explain one of her answers on cross examination. The State questioned the defendant concerning the presence of a Mr. John Russell in the courtroom and his reasons for being present. Testimony from agent Arnold earlier in the trial had made reference to Russell as a cocaine dealer whom the defendant knew.

The scope of cross examination is to be determined in the sound discretion of the trial judge. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Edwards*, 228 N.C. 153, 44 S.E. 2d 725 (1947). The defendant had every opportunity on redirect examination to explain John Russell's presence in the courtroom and her relationship, if any, with him. Therefore, the trial judge did not abuse his discretion in refusing to let her explain her answer on cross examination.

No error.

Chief Judge MORRIS and Judge VAUGHN concur.

STEVEN R. YELVERTON v. KEMP FURNITURE INDUSTRIES, INC.,
AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 808SC419

(Filed 17 March 1981)

Master and Servant § 108.1— misconduct connected with employee's work – no right to unemployment compensation benefits

Claimant's actions in threatening a fellow employee with bodily harm, leaving his assigned work area for the avowed purpose of going to another work area to harass a fellow employee, and picking up a wooden post in the course of an argument with the fellow employee were sufficient to constitute an intentional and substantial disregard of the employer's interest, and they thus constituted "misconduct connected with his work" within the meaning of G.S. 96-14 sufficient to disqualify him from receiving unemployment compensation benefits.

APPEAL by respondents, Kemp Furniture Industries, Inc. (employer) and the Employment Security Commission of North

Yelverton v. Furniture Industries

Carolina (Commission) from *Rouse, Judge*. Judgment entered 24 December 1979 in Superior Court, WAYNE, County. Heard in the Court of Appeals 16 October 1980.

Claimant, a print operator employed by respondent employer, was discharged from employment following an incident in which he allegedly threatened to hit another employee with a wooden post. Subsequent to his discharge, claimant filed with respondent Commission for unemployment compensation benefits.

The Claims Adjudicator determined that claimant was not "discharged for misconduct connected with his work," G.S. 96-14(2) (Supp. 1979), and that he thus was not disqualified from receiving benefits. The Appeals Referee affirmed that decision. On appeal by the employer from that decision, the Commission vacated and remanded. After further hearing the Appeals Referee issued supporting findings and memoranda and again affirmed the decision of the Claims Adjudicator that claimant was not disqualified from receiving benefits. The employer again appealed to the Commission. The Commission concluded that claimant "was discharged from his employment . . . for misconduct connected with his work" and was therefore disqualified from receiving benefits until he removed the disqualification by a method provided in G.S. 96-14(10).

Claimant appealed the Commission's decision to the superior court, which entered judgment, in pertinent part, as follows:

Upon a careful examination of the entire record . . . this Court concludes that the evidence . . . does not support a finding or a conclusion that the claimant . . . was discharged from his employment for misconduct connected with his work, and that the findings of fact . . . do not support a conclusion that the claimant . . . was discharged for misconduct connected with his work.

The respondents appeal from the court's judgment reversing the decision of the Commission, thereby holding claimant not to be disqualified, on account of misconduct connected with his work, from receiving unemployment compensation benefits.

Robert S. Cahoon, for claimant appellee.

Yelverton v. Furniture Industries

Johnson, Patterson, Dilthey and Clay, by Ronald C. Dilthey, for respondent-appellant Kemp Furniture Industries, Incorporated.

V. Henry Gransee, Jr., for respondent-appellant Employment Security Commission of North Carolina.

WHICHARD, Judge.

The Commission made the following pertinent findings of fact:

2. The claimant worked on the employer's furniture assembly line in the print line department as a helper. The claimant worked from 4:45 p.m. until 6:15 a.m.

3. Approximately sixty feet away from the claimant's work station at the end of the furniture assembly line, Ricky Vick worked as the last man on the end of the line taking furniture off the line and then stacking the furniture.

4. Ricky Vick had worked in the print line department, but approximately two weeks prior to the claimant's last day of work had been transferred to the end of the assembly line. After Mr. Vick's transfer, the claimant began teasing Mr. Vick about being moved to the end of the furniture assembly line.

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6. On the claimant's last day at work, the claimant approached Mr. Vick and stated that he was going to get Mr. Vick fired from his job and thereafter the claimant threatened Mr. Vick with bodily harm.

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8. After the twelve o'clock break, the claimant, Mr. Vick, and [another employee] returned to their work stations. Shortly thereafter, the claimant stated to [the other employee] that he was going out and harass Mr. Vick some more. The claimant left his work area and did not return.

9. The claimant proceeded to the tail end of the assembly line, and a co-worker heard the claimant and Mr. Vick arguing. The co-worker observed the claimant pick up a

Yelverton v. Furniture Industries

wooden post from a truck cart which was used to transport various materials. The claimant then put the wooden post on the truck cart and the co-worker "heard a lick," looked around and saw the claimant fall to the floor. Another co-worker observed Mr. Vick holding a wooden post and thereafter observed Mr. Vick strike the claimant on the head with the wooden post.

10. Mr. Vick and the claimant were discharged from their employment for violation of an employer policy which states that employees who are involved in fights and use or threaten to use any kind of weapon will be discharged.

These findings of fact are supported by competent evidence in the record. Therefore, they are conclusive on appeal. G.S. 96-4(m); G.S. 96-15(i); *In re Thomas*, 281 N.C. 598, 189 S.E. 2d 245 (1972); *In re Abernathy*, 259 N.C. 190, 130 S.E. 2d 292 (1963); *In re Cantrell*, 44 N.C. App. 718, 263 S.E. 2d 1 (1980). The sole question presented by this appeal, then, is whether these findings of fact sustain the Commission's conclusion that claimant was disqualified from receiving unemployment compensation benefits by virtue of G.S. 96-14, which provides, in pertinent part, as follows:

An individual shall be disqualified for benefits:

. . . .

- (2) ... if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work.

G.S. 96-14 (Supp. 1979).

In determining whether facts found constitute "misconduct" within the intent of G.S. 96-14(2), this Court has quoted with approval the following definition:

***[T]he term "misconduct" [in connection with one's work] is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as

Yelverton v. Furniture Industries

to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.***

In re Collingsworth, 17 N.C. App. 340, 343-344, 194 S.E. 2d 210, 212-213 (1973), quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941). This Court also has stated that "where the claimant is discharged because he willingly and knowingly violates a reasonable rule of his employer, the claimant is disqualified" from receiving benefits. *Cantrell*, 44 N.C. App. at 721, 263 S.E. 2d at 3 (violation of employer's policy establishing rotation system for truck drivers by refusing to make trip constituted misconduct). See also *In re Stutts*, 245 N.C. 405, 95 S.E. 2d 919 (1957) (willful violation of employer's rule prohibiting employees from changing the weights on their machines constituted misconduct); *In re Collingsworth*, 17 N.C. App. 340, 194 S.E. 2d 210 (1973) (refusing to follow employer's rule requiring employees to wear ear protective devices constituted misconduct).

The Commission here found as a fact that the employer had adopted a policy "that employees who are involved in fights and use or threaten to use any kind of weapon will be discharged." It also found that "the claimant threatened [a fellow employee] with bodily harm" and that "a co-worker heard the claimant and [the fellow employee] arguing . . . [and] observed the claimant pick up a wooden post" Finally, it found that claimant was discharged for violation of the employer's policy "which states that employees who are involved in fights and use or threaten to use any kind of weapon will be discharged." On the basis of these findings the Commission concluded that claimant was discharged for "misconduct connected with his work" within the intent of G.S. 96-14(2). The Commission stated, in its Memorandum of Law, that "the claimant chose a course of action which was in complete disregard of the employer's best interest and represented a disregard of standards of behavior which the employer has a right to expect of his employee."

We note that the findings do not support a conclusion that claimant "willingly and knowingly violate[d] a reasonable rule of his employer," *Cantrell*, 44 N.C. App. at 721, 263 S.E. 2d at 3, because the Commission failed to find that claimant had knowl-

Yelverton v. Furniture Industries

edge of the policy he was found to have violated.¹ The definition approved in *Collingsworth*, however, permitted the Commission to find misconduct and thus to deny benefits, not only for "deliberate violations or disregard of standards of behavior which the employer ha[d] the right to expect," but also for "carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." *Collingsworth*, 17 N.C. App. at 343-344, 194 S.E. 2d at 212-213. The employer here had a substantial interest in the preservation of a peaceful atmosphere in the workplace; in having its employees perform their assigned tasks rather than harass their fellow employees; in not having its employees diverted from their assigned tasks by the harassment of fellow employees; and in not having its employees risk debilitating injuries at the hands of fellow employees. The claimant's actions in (1) threatening a fellow employee with bodily harm, (2) leaving his assigned work area for the avowed purpose of going to another work area to harass a fellow employee, and (3) picking up a wooden post in the course of an argument with the fellow employee, were sufficient to constitute "an intentional and substantial disregard of the employer's interests." They thus constituted "misconduct connected with his work" sufficient to disqualify him from receiving unemployment compensation benefits. We therefore reverse the judgment of the superior court and reinstate the decision of the Employment Security Commission which disqualifies claimant from receiving unemployment compensation benefits. See *Cantrell*, 44 N.C. App. at 723, 263 S.E. 2d at 4.

Reversed.

Judges CLARK and WEBB concur.

¹The following evidence in the record would have supported such a finding:

Q. . . . Mr. Yelverton, were you aware of a policy that if a weapon was used to threaten another employee that the employee doing the threatening would be discharged?

A. Yes.

State v. Roberts

STATE OF NORTH CAROLINA v. FLOYD LUTHER ROBERTS

No. 8010SC845

(Filed 17 March 1981)

1. Criminal Law § 32.2; Forgery § 2— attempt to obtain money by forged check – presumption that defendant forged check

In a prosecution for forging and uttering forged checks, the trial court's instruction that when a person in possession of a forged check attempts to obtain money or advances upon it, a presumption is raised that the defendant either forged or consented to the forging of such check and, nothing appearing, the defendant would be presumed guilty of forgery described a mere permissive inference which did not violate due process since (1) there is a rational connection between the basic and elemental facts such that upon proof of the basic facts (possession of a forged check and attempting to obtain money from it), the elemental facts (either forged or consented to forging of such check) are more likely to exist, and (2) there is other evidence in the case which, taken together with the inference, is sufficient for a jury to find the elemental facts beyond a reasonable doubt.

2. Forgery § 2— defendant's signature on check – refusal to instruct on presumption of authority

In a prosecution for forgery and uttering forged checks, the trial court did not err in refusing to charge that when a defendant signs the name of another to an instrument it is presumed he did so with authority where defendant offered no evidence that he signed the checks with authority but testified that he had never seen the checks.

APPEAL by defendant from *Braswell, Judge*. Judgment entered 11 June 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 15 January 1981.

Defendant was found guilty as charged in two indictments of both forging and uttering (1) on 25 October 1979 a check in the sum of \$80.00 drawn on North Carolina National Bank at Chapel Hill purportedly signed by Tony Farmer, and (2) on 1 November 1979 a check in the sum of \$65.00 drawn on the same bank by the same drawer. The cases and counts were consolidated for judgment. The defendant appeals from the judgment imposing a prison term of not less than 5 nor more than 10 years.

STATE'S EVIDENCE

Cheryl Newton, a teller for North Carolina National Bank, Cameron Village Branch, cashed the two checks payable to "Cash" described in the indictments for defendant. Tony Farm-

State v. Roberts

er lost his checks at the Royal Villa on 23 October 1979. He did not authorize anyone to sign his name to the two checks.

Defendant was employed as a desk clerk in October 1979. A check in the sum of \$300.00 drawn on N.C.N.B., purportedly signed by Tony Farmer, payable to "Royal Villa," and dated 27 October 1979, was returned unpaid to the Royal Villa. Pursuant to the check cashing policy of the Villa, the back of the check was stamped and partially filled in with "Room 109" and the initials "F.R.;" Defendant was the only desk clerk at that time with those initials. Room 109 was not occupied on that date. The check was deposited with other checks on 26 October 1979.

On 3 January 1980 defendant made a split deposit of a \$265.73 check, taking \$200.00 in cash and depositing the balance of \$65.73. The check was a printed Roberts Company and Associates check purportedly signed by Patricia Nesbitt, payable to Willie Jones, and drawn on N.C.N.B. Defendant made the deposit in the name of Willie Jones and received \$200.00 in cash.

DEFENDANT'S EVIDENCE

Defendant testified that he usually cashed his Royal Villa payroll checks at N.C.N.B. in Cameron Village. He had not previously seen the two checks in question and had never seen any blank checks on which the name of Tony Farmer was printed. He had never been in the Durham branch of N.C.N.B. He did not remember cashing a \$300.00 check at the Villa for Tony Farmer.

Attorney General Edmisten by Assistant Attorney General Elisha H. Bunting, Jr. for the State.

Emanuel and Thompson by W. Hugh Thompson for defendant appellant.

CLARK, Judge.

[1] The defendant argues that the trial court erred in charging as follows:

"I instruct you that it is the law that when a person is found in the possession of a forged check and he is endeavoring to obtain money or advances upon it, this raises a presumption that the defendant either forged or con-

State v. Roberts

sented to the forging of such check, and nothing appearing, the person would be presumed to be guilty of forgery.”

Defendant relies on *State v. White*, 300 N.C. 494, 268 S.E. 2d 481 (1980), contending that the presumption as charged was mandatory and violated due process in shifting the burden of persuasion to the defendant. We find defendant’s reliance on *White* is misplaced. *White* involved the mandatory presumption that the defendant-husband was the father upon proof that the child was born during the marriage of her mother and defendant, unless there was some evidence that defendant could not have had access to the mother during a reasonable period of gestation. The court approved the trial court’s instructions on this mandatory presumption and held that it did not violate due process by shifting the burden of persuasion to the defendant.

In the case before us it is apparent that the instruction describes a permissive inference, and that due process was not violated because (1) there is a rational connection between the basic and elemental facts such that upon proof of the basic facts (possession of a forged check and endeavoring to obtain money from it), the elemental facts (either forged or consented to forging of such check) are more likely to exist; and (2) there is other evidence in the case which, taken together with the inference of presumption, is sufficient for a jury to find the elemental facts beyond a reasonable doubt. The elemental fact was not conclusively prejudged and the burden to disprove the existence of the elemental fact was not actually shifted to the defendant.

Before giving the questioned instruction the trial court instructed as to the State’s and defendant’s evidence. The presumption instruction ended with the words “and nothing appearing, the person would be presumed to be guilty of forgery.” The trial court then charged that the State must prove each of the elements of the offense beyond a reasonable doubt. The State offered substantial direct evidence of the basic facts and additional evidence connecting defendant with the lost checks, evidence unquestionably sufficient to support the jury verdict. Finally, we do not think the challenged presumption either places an unfair burden on the defendant or otherwise results in substantive injustice. This assignment of error is overruled.

State v. Powell

[2] The trial court did not err in refusing to charge, as requested by the defendant, that when a defendant signs the name of another to an instrument it is presumed he did so with authority. In *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975), it was held that such instruction was not appropriate where defendant offered no evidence that he signed the checks with authority but testified that he did not sign the checks. In the case *sub judice*, the defendant did not offer evidence that he signed the checks but testified that he had never seen the checks.

We have carefully considered the defendant's other assignments of error and the arguments in his brief, relating to evidentiary matters, in light of the rule that a new trial will be granted only if the error is prejudicial or harmful. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976). A defendant is prejudiced when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. G.S. 15A-1443(a). The record on appeal reveals that the State's evidence of defendant's guilt is substantial.

No error.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. WADE LEE POWELL

No. 8010SC990

(Filed 17 March 1981)

Assault and Battery § 15.6— self-defense — failure to instruct on victim as violent and dangerous man

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, considering the totality of the evidence presented, the paucity of evidence tending to show self-defense, the fact that the court's instructions to the jury as to self-defense were otherwise complete, and the fact that the court adequately instructed the jury as to the defense of accident, defendant failed to sustain the burden imposed on him by G.S. 15A-1443 of showing prejudice as a result of the trial court's error in failing to charge regarding the evidence that the victim was a violent and dangerous man.

State v. Powell

APPEAL by defendant from *Braswell, Judge*. Judgment entered 29 May 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 2 March 1981.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injuries. He pleaded not guilty and was tried before a jury.

The State presented Harry McKethan to testify. He testified that he was in charge of a grocery store on 1 December 1979 when defendant's brother Skip Powell entered and asked for a paper towel. He refused to give him the towel. Skip then went outside and talked with his brothers, Byron Powell and the defendant. Byron entered the store threatening to take McKethan's gun and kill him. He grabbed McKethan's arm, and defendant then entered the store and grabbed his other arm. McKethan was able to get his hand on his .38 caliber pistol under the grocery store counter, but Byron took the gun away and gave it to defendant. Defendant stood six or seven feet from McKethan and shot him in the stomach. Byron and defendant walked out of the store; but they returned after several minutes, and defendant shot McKethan in the right hand. McKethan denied ever pointing the gun at anyone.

Defendant testified that he was outside the store when he saw McKethan pull the pistol and saw his brother Byron struggling with McKethan. He entered the store and tried to get the pistol from McKethan "so no one would get hurt," but the gun went off during the struggle. Defendant took the gun and went outside. He opened the door of the store and fired in the air just as McKethan "threwed up his hands," and defendant "guess[ed] that's about how he got his [sic] in the wrist." Defendant testified that he fired the second time to scare McKethan because McKethan had pulled a gun on him in 1975 and had shot him in the leg in 1973.

Defendant was convicted as charged and sentenced to imprisonment. He appeals.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Cyrus A. Holbrook for defendant appellant.

WHICHARD, Judge.

State v. Powell

By his sole argument on appeal defendant contends the trial court erred in its instructions on self-defense. He argues that the court should have instructed the jury to consider, in determining the reasonableness of defendant's apprehension of death or great bodily harm, among other factors, the reputation of McKethan for danger and violence.

In prosecutions for homicide and assault, where the defendant pleads and offers evidence of self-defense, evidence of the character of the victim as a violent and dangerous fighting man is admissible if such character was known to the defendant. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967); *see also State v. Mize*, 19 N.C. App. 663, 199 S.E. 2d 729 (1973); 1 Stansbury's N.C. Evidence, § 106 (Brandis rev. 1973). Such evidence is relevant on the question of the defendant's reasonable apprehension of death or bodily harm in his confrontation with the victim, *Johnson*, 270 N.C. at 219, 154 S.E. 2d at 52; and it may include specific acts of violence by the deceased. As stated in *Johnson*:

We know of no better way to impart the knowledge of fear or apprehension on the part of defendant than by giving the jury the benefit of specific incidents tending to show the dangerous and violent character of the deceased. It remains in the province of the jury to decide whether the incidents occurred or whether defendant's apprehension was a reasonable one.

270 N.C. at 219-220, 154 S.E. 2d at 52.

It is also true that when such evidence is introduced by the defendant, the court, even in the absence of a request, should instruct the jury as to the bearing which this evidence might have on defendant's reasonable apprehension of death or great bodily harm from the attack to which his evidence pointed. *State v. Rummage*, 280 N.C. 51, 54, 185 S.E. 2d 221, 224 (1971); *State v. Riddle*, 228 N.C. 251, 45 S.E. 2d 366 (1947); *State v. Hall*, 31 N.C. App. 34, 228 S.E. 2d 637 (1976); *State v. Covington*, 9 N.C. App. 595, 176 S.E. 2d 872 (1970).

In this case the trial court instructed with respect to defendant's reasonable apprehension as follows:

If you find from the evidence beyond a reasonable doubt that defendant Wade Powell feloniously assaulted Harry

State v. Powell

McKethan with a firearm, a pistol, and shot him, that assault would be excused as being in self-defense, only if the circumstances at the time he acted were such as would create in the mind of a person with ordinary firmness a reasonable belief that such action was necessary or apparently necessary to protect himself from death or great bodily harm, and the circumstances did create such belief in the defendant's mind.

It is for you the jury to determine the reasonableness of Wade Powell's belief from the circumstances as they appear [sic] to him at the time. However, the force used by Wade Powell cannot have been excessive. This means that Wade Powell had the right to use only such force as reasonably appeared to him to be necessary under the circumstances, to protect himself from death or great bodily harm.

In making this determination you should consider the circumstances as you found them to have existed from the evidence, including the size, age, and strength of Wade Powell; as compared to size, age, and strength of Harry McKethan, the alleged victim; the fierceness of the assault if any upon the defendant by Harry McKethan; and whether or not Harry McKethan had a weapon in his possession.

We agree with the defendant that the court erred by failing to correlate the evidence of McKethan's previous assaults upon defendant, which indicated that McKethan was a dangerous and violent man, with the defendant's plea of self-defense. *State v. Riddle*, 228 N.C. 251, 45 S.E. 2d 366 (1947). It remains for us to determine whether defendant has sustained his burden of showing that this error was sufficiently prejudicial to warrant a new trial. G.S. 15A-1443(a).

In *Rummage*, our Supreme Court stated, per Justice (now Chief Justice) Branch:

In instant case there was plenary evidence that deceased was a dangerous and violent man when he was intoxicated. There was also evidence that he was intoxicated at the time he was fatally shot. The trial judge failed to charge as to the bearing the reputation of deceased as a violent man might have had on defendant's reasonable

State v. Powell

apprehension of death or great bodily harm at the time deceased allegedly attacked or threatened to attack defendant. This was error.

Nevertheless, we are reluctant to hold that this error, standing alone, constituted reversible error, since the trial judge had otherwise fully charged on self-defense.

280 N.C. at 54-55, 185 S.E. 2d at 224. Here, too, the jury instructions as to self-defense were otherwise complete; and we are equally reluctant to hold that "this error, standing alone, constituted reversible error." *Rummage*, 280 N.C. at 55, 185 S.E. 2d at 224. Considering the totality of the evidence presented, and the paucity of evidence tending to show self-defense, we do not believe "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . ." G.S. 15A-1443(a). This is especially true in light of the fact that the evidence here established that defendant shot the victim twice. As to the second shooting defendant did not assert a defense of self-defense, but rather asserted that this shot hit the victim by accident.

We hold that, considering (1) the totality of the evidence presented, (2) the paucity of evidence tending to show self-defense, (3) the fact that the court's instructions to the jury as to self-defense were otherwise complete, and (4) the fact that the court adequately instructed the jury as to the defense of accident, defendant has failed to sustain the burden imposed on him by G.S. 15A-1443 of showing prejudice as a result of the court's error in failing to charge regarding the evidence that the victim was a violent and dangerous man.

No error.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

State v. Hodges

STATE OF NORTH CAROLINA v. RANDOLPH HODGES

No. 802SC774

(Filed 17 March 1981)

Constitutional Law § 67— identity of confidential informant — disclosure required

In this prosecution for sale of marijuana and possession of marijuana with intent to sell, defendant's right to due process was violated by the State's refusal to reveal the identity of a confidential informant who introduced an SBI undercover agent to defendant and was present when defendant sold marijuana to the agent.

APPEAL by defendant from *Brown, Judge*. Judgment entered 3 July 1980 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 8 January 1981.

Defendant was charged with (1) sale of marijuana, and (2) possession of marijuana with intent to sell on 21 February 1980. Defendant had previously been convicted of a separate offense under the Controlled Substance Act. He was found guilty as charged of the sale and guilty of the lesser offense of possession of marijuana. He appeals from the judgment imposing a two-year prison term on the sale of marijuana conviction.

Defendant was found not guilty of like charges allegedly committed on 4 April 1980.

On 1 May 1980 defendant's counsel wrote to the District Attorney requesting the names and addresses of all persons present and participating in the alleged sale of marijuana. The letter was not answered.

On 30 May 1980 defendant moved for discovery of all evidence under G.S. 15A-903 as requested in his letter of 1 May 1980.

On 1 July 1980 defendant moved to suppress the testimony of S.B.I. Agent John Bowden on the ground that he was acting as undercover agent in concert with informant Henry Gorham, who participated in the offenses, and that the State had failed to reveal the name of the informant. The record reveals that defendant did not become aware of the informant and his name until 2:30 p.m. on 1 July 1980.

State v. Hodges

On the following day the case was called for trial, and the motion was denied, without hearing, but the court ordered the arrest of Henry Gorham. The court also denied a motion for continuance.

At trial Agent Bowden testified that he and confidential informant Henry Gorham went to defendant's home on 21 February 1980, where Gorham introduced Agent Bowden to defendant. Defendant sold a half-ounce of marijuana to Bowden for \$20.00. Agent Bowden and Gorham then left defendant's home and met other S.B.I. agents.

The defendant stipulated that he had been convicted of possession of marijuana with intent to sell on 23 May 1979.

Defendant offered no evidence, but moved for a mistrial because Henry Gorham had not been found. The motion was denied.

Attorney General Edmisten by Assistant Attorney General Alan S. Hirsch for the State.

James R. Vosburgh for defendant appellant.

CLARK, Judge.

The principal question raised by this appeal is whether the defendant's Due Process Right was violated by the prosecution's refusal to disclose the identity of an informant who was present during and participated in the offenses charged.

At the outset we note that we are not concerned with probable cause for an arrest or probable cause for a search warrant under G.S. 15A-978. *See State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975). Instead, we are involved with guilt or innocence, the right of the defendant to know the identity of a participating informant in advance of trial so that the defendant may properly prepare his defense. In the question we are guided by *Roviaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957), where the petitioner had been charged with the sale of heroin to "John Doe," and the government refused to disclose on the grounds that since John Doe was an informer it was the prosecution's privilege to withhold his identity. In allowing relief on the petition for *habeas corpus* the court stated:

State v. Hodges

“What is usually referred to as the informer’s privilege is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

* * * *

“We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.”

Id. at 59, 62, 1 L. Ed. 2d at 644, 646, 77 S. Ct. at 627, 628-29.

The *Roviaro* court found that the circumstances demonstrated that John Doe’s possible testimony was highly relevant and might have been helpful to the defense, concluding that the informer’s privilege is not absolute, and that disclosure is required when the informer participates in the alleged crime and is thus a material witness and might have been helpful to the defense. Though *Roviaro* was decided in 1957, the decision is often recognized and cited in both federal and state court decisions to support the principle of law that disclosure is required where the informant is an actual participant. See *United States v. Raddatz*, 447 U.S. 667, 65 L. Ed. 2d 424, 100 S. Ct. 2406 (1980); *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975); *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Orr*, 28 N.C. App. 317, 220 S.E. 2d 848 (1976); *State v. Parks*, 28 N.C. App. 20, 220 S.E. 2d 382 (1975), *cert. denied*, 289 N.C. 301, 222 S.E. 2d 701 (1976).

State v. Hodges

We must determine if the particular circumstances of the case *sub judice* are such that the defendant's right to due process was violated by the State's refusal to reveal the informer's identity. The indictment disclosed the name of S.B.I. Agent Bowden as the person to whom the marijuana was allegedly sold. It does not appear that defendant had any knowledge of any other person being present and participating, and that he sought to obtain this information in advance of trial through discovery as provided by G.S. 15A-902. The District Attorney failed to disclose the name of the participating informant, who according to the testimony of Agent Bowden introduced him to the defendant and was present when defendant sold the marijuana.

It further appears from the record that defendant's counsel learned the name of the informant at 2:30 p.m. the day before the case was called for trial. (Defense counsel in his brief stated that he learned the name of the informant when he overheard an argument between Agent Bowden and an unknown person as to whether the two of them had been together in defendant's home.) Defense counsel immediately filed a motion to suppress the testimony of Agent Bowden on the grounds that the District Attorney had failed to disclose the name of the participating informant as requested. Though the motion to suppress may not have been appropriate, defendant moved for a continuance on the following day when the case was called for trial. The motion was denied, but the court issued an order of arrest for informant Gorham.

The name of the participating informant should have been disclosed to the defendant in advance of trial and in time for him to interview the informant and determine whether his testimony would have been beneficial to defendant. This was a matter for the accused rather than the State to decide.

We conclude that, in light of the refusal of the State to disclose the name of the informant prior to trial and other circumstances, the denial of the defendant's motion to continue violated his right to due process and was error entitling defendant to a new trial.

The judgment is reversed and we order a

State v. Cooper

New Trial.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD COOPER

No. 804SC832

(Filed 17 March 1981)

Criminal Law § 142.4— invalid condition of probation violated – activation of suspended sentence improper

Where defendant was convicted of felonious possession of stolen credit cards and placed on probation for a period of three years, one of the conditions of his probation being that he not operate a motor vehicle on the streets or highways of N.C. from 12:01 a.m. until 5:30 a.m. during the period of probation, the trial court erred in revoking probation and activating his suspended sentence, since the condition of probation allegedly breached by defendant was not one reasonably related to the offense committed, and the failure of defendant to object at the time the condition was imposed in no way constituted a waiver of his right to object to the condition at a later time. G.S. 15A-1342(g).

Judge VAUGHN dissenting.

APPEAL by defendant from *Stevens, Judge*. Order entered 21 April 1980 in Superior Court, ONSLOW County. Heard in the Court of Appeals 29 January 1981.

On 18 December 1979, defendant pleaded guilty to fourteen counts of felonious possession of stolen credit cards. He was given a suspended sentence of not less than two nor more than three years and placed on probation for a period of three years. One of the conditions of his probation was that he “not operate a motor vehicle on the streets or highways of North Carolina from 12:01 a.m. until 5:30 a.m. during the period of probation.” On 21 April 1980, defendant’s probation was revoked pursuant to G.S. 15A-1345. Revocation was based on the testimony of two Jacksonville patrolmen who testified that they saw the defendant operating a motor vehicle between the hours of 12:01 a.m. and 5:30 a.m. on the 22nd and 29th days of December 1979 in violation of the terms of his probation.

The defendant denied the allegations and presented evidence that on 22 December 1979, the car he was allegedly driv-

State v. Cooper

ing was actually being used in South Carolina by a friend, Brenda Duncan. Additionally, he presented evidence that he was in the car on 29 December 1979 during the prohibited driving time, but that the car was being driven by someone else.

Upon revocation of his probation, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Bailey, Raynor & Erwin, by Edward G. Bailey, for defendant appellant.

BECTON, Judge.

Defendant makes two related assignments of error which will be considered together. The thrust of his argument is that Condition (N) of his Probation Judgment — that he not operate a motor vehicle between 12:01 a.m. and 5:30 a.m. — was not reasonably related to the offense committed nor was it imposed for a reasonable period of time. Defendant argues, therefore, that the Court's order revoking probation and activating his suspended sentence was erroneously entered because it was based on an alleged violation of an invalid condition of probation. We agree.

Conditions of probation must bear some reasonable relationship to the offense committed by the defendant, *State v. Smith*, 233 N.C. 68, 62 S.E. 2d 495 (1950), and must be reasonably related to his rehabilitation, G.S. 15A-1343(b)(17). The failure of the defendant to object at the time the condition was imposed in no way constitutes a waiver of his right to object to the condition at a later time. G.S. 15A-1342(g).

The State cites *State v. Smith, supra*, to support its position that the driving prohibition herein was reasonably related to the offense charged and to defendant's rehabilitation. In *Smith*, however, the defendant was convicted of larceny upon evidence that he used a motor vehicle to steal 900 pounds of cotton. The court pointed out, "[i]f, in committing the larceny the defendant used an automobile, the crime and the operation are directly related." *Id.* at 70, 62 S.E. 2d at 496.

In the case *sub judice*, the defendant pleaded guilty to possession of stolen credit cards. No evidence appears in the record that defendant used an automobile to facilitate a theft or

State v. Cooper

the possession of the cards. It is clear that use of a car is not necessary to steal or possess credit cards, and it is equally clear that prohibiting the use of a car adds little or nothing to this defendant's rehabilitation for committing that particular crime. Additionally, the time of driving prohibition — 12:01 a.m. until 5:30 a.m. — is a time period during which the defendant is least likely to use stolen credit cards.

Based on the evidence in the record then, we find that the condition of probation allegedly breached by the defendant is not one reasonably related to the offense committed. As such, revocation of the defendant's probation was improper. Although finding this condition unreasonably related to the particular offense in this case, we in no way wish to discourage the courts from placing individuals on probation subject to the imposition of reasonable conditions for continued release. Additionally, we do not reach the question of the reasonableness of the length of time of the probation conditions. For the reasons stated herein, we hold that the revocation of defendant's probation was improper.

Reversed.

Chief Judge MORRIS concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

We must start with the proposition that there is a presumption of validity to the proceeding at defendant's original trial, and the burden is on defendant to show otherwise. The only things before us that took place before Judge Llewellyn are defendant's pleas of guilty to 12 felonies which would have permitted the imposition of prison sentences totaling 42 years and his judgment imposing a sentence of not less than 2 nor more than 3 years, suspended on certain conditions including the one about which defendant now complains. He was later brought before Judge Stevens on allegations that he had operated a motor vehicle in violation of the judgment. In the only evidence in the record, the State offered evidence tending to show the violation, and defendant offered evidence tending to show that he did not operate the vehicle as alleged. Judge Stevens found for the State and revoked probation. We know nothing of the circumstances surrounding the commission of

Pedwell v. First Union Natl. Bank

the 12 felonies to which defendant pleaded guilty, and we know nothing about the habits, character, weaknesses or propensities of defendant that could have been before the sentencing judge. Defendant was not represented at the revocation proceeding by the attorney who represented him when he was sentenced. We know nothing of the pleas and representations made by defendant, his family or trial counsel to the sentencing judge. Indeed, so far as we know, the probation condition of which he now complains may very well have been one for which his trial counsel prayed as an alternative to active imprisonment (a subject of growing concern). I am unwilling to say that the condition is unreasonable as a matter of law when I know nothing about the circumstances under which it was imposed. I vote to affirm the judgment.

MICHAEL R. PEDWELL AND WIFE, VICKI A. PEDWELL v. FIRST UNION
NATIONAL BANK OF NORTH CAROLINA AND CAMERON-BROWN
COMPANY

No. 8021SC707

(Filed 17 March 1981)

**Conspiracy § 2; Unfair Competition § 1—civil conspiracy – unfair trade practice –
sufficiency of complaint**

Plaintiffs' complaint stated a claim for relief against defendant bank and defendant mortgage lender for civil conspiracy and treble damages under the unfair trade practices statute, G.S. 75-1.1(a), where it alleged that plaintiffs contracted with defendant bank to purchase a condominium; pursuant to the terms of the contract, plaintiffs applied for a loan to defendant lender to finance the purchase of the condominium; defendant bank thereafter determined it did not want to perform the contract and made an agreement with defendant lender by which defendant lender would not make a loan to plaintiffs to finance the purchase and would not notify plaintiffs of the loan refusal until it was too late for plaintiffs to secure alternate financing; and defendant lender, in furtherance of this agreement, refused to make the loan, not because of a legitimate business reason, but in order to prevent plaintiffs from performing their part of the contract.

APPEAL by plaintiffs from *Davis, Judge*. Judgment entered 9 April 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 February 1981.

Pedwell v. First Union Natl. Bank

The plaintiffs appeal from an order dismissing their complaint pursuant to G.S. 1A-1, Rule 12(b)(6). The plaintiffs alleged they had made a contract with the First Union National Bank to purchase from the bank a condominium in Ashe County; that pursuant to the terms of the contract, they made application for a loan to Cameron-Brown Company to finance the purchase of the condominium; that the closing date for the purchase was 15 November 1979; and that on 9 November 1979 the plaintiffs were informed by the defendant Cameron-Brown Company that the loan would not be made. The plaintiffs further alleged that the defendants had conspired to keep the plaintiffs from purchasing the condominium by having Cameron-Brown refuse the plaintiffs a loan at a time when it was too late for them to obtain alternate financing, and that the defendants have breached their contract with the plaintiffs. The plaintiffs prayed that they have and recover treble damages pursuant to G.S. 75-1 *et seq.* From the order dismissing the complaint, the plaintiffs have appealed.

Alexander, Hinshaw and Schiro, by Gregory W. Schiro, for plaintiff appellants.

Hutchins, Tyndall, Bell, Davis and Pitt, by Walter W. Pitt, Jr. and Richard D. Ramsey, for defendant appellees.

WEBB, Judge.

The defendants' motion to dismiss pursuant to Rule 12(b)(6) should not have been allowed unless it appears from the complaint that the plaintiffs can prove no state of facts that will entitle them to relief. *F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 250 S.E. 2d 693 (1979).

The plaintiffs have made allegations which, if proved, could establish that the bank made a contract to sell a condominium to the plaintiffs; that after making the contract, the bank determined it did not want to perform the contract; that the bank then made an agreement with Cameron-Brown by which Cameron-Brown would not make a loan to the plaintiffs to finance the purchase and would not notify the plaintiffs of the loan refusal until it was too late for the plaintiffs to secure alternate financing; and that Cameron-Brown, in furtherance of this agreement, refused to make the loan, not because of a legitimate business reason, but in order to prevent the plain-

State v. Donald

tiffs from performing their part of the contract. A party to an executory contract is under a duty not to do anything to prevent the other party to the contract from performing. When he does something that prevents the other party from performing, he is liable in damages. *See Transfer, Inc. v. Peterson*, 37 N.C. App. 56, 245 S.E. 2d 207 (1978). If the bank entered into an agreement with Cameron-Brown to prevent the plaintiffs from performing this part of the contract and Cameron-Brown did in fact prevent the plaintiffs from so performing, the defendants would be liable for their acts pursuant to this conspiracy. *See Shope v. Boyer*, 268 N.C. 401, 150 S.E. 2d 771 (1966) for a discussion of civil conspiracy. It was error to dismiss this action.

If the jury should find that the defendants conspired to prevent the plaintiffs from performing their part of the contract, this would be an "unfair . . . act . . . affecting commerce" under G.S. 75-1.1(a). *See Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977) and *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977).

Reversed and remanded.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. RONNIE ALAN DONALD

No. 8025SC801

(Filed 17 March 1981)

Automobiles § 120— driving under the influence – reckless driving not lesser included offense

The offense of reckless driving under G.S. 20-140(c) is not a lesser included offense of operating a vehicle upon a highway when the amount of alcohol in the driver's blood is .10% or more, a violation of G.S. 20-138(b).

APPEAL by defendant from *Grist, Judge*. Judgment entered 16 April 1980 in Superior Court, BURKE County. Heard in the Court of Appeals 27 January 1981.

Defendant was tried and convicted in district court of operating a vehicle upon a highway when the amount of alcohol in his blood, by weight, was 0.10 percent or more. G.S. 20-138(b).

State v. Donald

From his conviction, he appealed to Superior Court where he was again tried for violating G.S. 20-138(b).

At trial, the State's evidence tended to show that on 20 October 1979, a Morganton Public Safety Officer observed defendant driving a Motobecane on a public street. The vehicle was weaving badly within its lane. After following defendant for two to three blocks, the officer stopped him. The officer observed that defendant had a strong odor of alcohol on his breath, that his face was flushed, that his hair was "messed up", and that he was unsteady on his feet. The officer arrested defendant for driving under the influence of alcohol and took him to police headquarters where a second officer administered a breathalyzer test. The test showed that the alcohol in defendant's blood, by weight, was sixteen one-hundredths of one percent (0.16).

Defendant offered no evidence. The jury returned a verdict of guilty, and from that verdict and judgment entered thereon, defendant appeals.

Attorney General Edmisten, by William W. Melvin, Deputy Attorney General, and William B. Ray, Assistant Attorney General, for the State.

Triggs and Mull, by C. Gary Triggs, for defendant-appellant.

BECTION, Judge.

Defendant's first assignment of error is that the trial court failed "to instruct the jury as to the lesser included offense of reckless driving (G.S. 20-140(c))." The law in North Carolina is clear on this issue:

When a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment.

State v. Riera, 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970). When there is evidence to support the lesser verdict, the trial court must charge upon it, even in the absence of a specific request for the instruction. *Id.*

State v. Donald

In order, therefore, for defendant to prevail in this assignment of error, he must first establish that the offense of reckless driving under G.S. 20-140(c) is a lesser included offense of G.S. 20-138(b).

G.S. 20-138(b) makes it unlawful for a person to operate a motor vehicle upon any highway or public vehicular area when the amount of alcohol in such person's blood is 0.10 percent or more by weight. Hence, conviction for violation of G.S. 20-138(b) requires the State to prove three things beyond a reasonable doubt: (1) that the defendant operated a motor vehicle, (2) upon a public way, (3) when the amount of alcohol in his blood is 0.10 percent or more. On the other hand, G.S. 20-140(c) requires the State in reckless driving cases to prove (1) that defendant operated a motor vehicle, (2) upon a public way, (3) after consuming such quantity of intoxicating liquor, (4) as directly and visibly affected his operation of the vehicle.

G.S. 20-138(b), with which defendant was charged, does not contain all the essential elements of G.S. 20-140(c). Proof that defendant had a certain amount of alcohol in his blood does not prove that defendant had consumed such quantity of intoxicating liquor as directly and visibly affected his operation of his motor vehicle. We believe that the reference within G.S. 20-140(c), that the offense of reckless driving is a lesser included offense of driving under the influence of intoxicating liquor, refers to G.S. 20-138(a) (driving under the influence) and not to 20-138(b) (0.10 offense). This conclusion is supported by G.S. 20-138(b) which also states that the offense therein is a lesser included offense of driving under the influence, an obvious reference to G.S. 20-138(a). We hold, therefore, that defendant was not entitled to jury instructions on the offense of reckless driving under G.S. 20-140(c) because it is not a lesser included offense of G.S. 20-138(b).

Defendant also objects to the trial court's admission into evidence of testimony concerning the breathalyzer test administered to him. The record of the trial failed to disclose that defendant objected to or took exception to the breathalyzer evidence presented by the State. In fact, in his cross examination of the witness in question, defendant elicited the same evidence about which he now complains. His assignment of

State v. Whitfield

error has no basis and is, therefore, rejected. *Abbitt v. Bartlett*, 252 N.C. 40, 112 S.E. 2d 751 (1960).

Defendant's further arguments relating to the trial court's denial of his motions for nonsuit, to set the verdict aside as being against the greater weight of the evidence, and for a directed verdict, all depend upon his success in his earlier arguments. They are, therefore, without merit.

In defendant's trial and the judgment entered therein, we find

No error.

Chief Judge MORRIS and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. LEO WHITFIELD, JR. AND JAMES
EARL MCKOY

No. 8013SC977

(Filed 17 March 1981)

Narcotics § 4— manufacture of marijuana— sufficiency of evidence

In a prosecution of defendants for feloniously manufacturing marijuana, evidence was sufficient to be submitted to the jury where it tended to show that both defendants made extra-judicial admissions implicating themselves in the intentional harvesting and cutting of marijuana; there was plenary evidence of the manufacture of marijuana by someone; excluding defendants' admissions, there was still evidence that defendants, farm laborers in a rural area, were seen by various law enforcement officers operating and riding upon a tractor discing a field in which plants subsequently identified as marijuana were growing and had been cut; and marijuana was being stored in three barns in close proximity to the areas where defendants were tilling the soil.

APPEAL by defendants from *McLelland, Judge*. Judgment entered 3 June 1980 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 12 February 1981.

The defendants, Leo Whitfield, Jr. and James Earl McKoy were indicted in separate bills of indictment for feloniously manufacturing a controlled substance, to wit: marijuana. Their cases were consolidated for trial, and both defendants were convicted of feloniously manufacturing marijuana. From iden-

State v. Whitfield

tical prison sentences, each defendant appealed. The defendants raised the same issue on appeal: whether the court erred in denying each defendant's motion for nonsuit made at the close of the State's evidence and at the close of all the evidence. Evidence introduced on behalf of the State may be summarized as follows:

On 5 November 1979 the defendants were arrested after they were observed on a tractor discing a field on the Old Elkins Farm leased by Pou Elkins. Defendant Whitfield had a shotgun with him in the cab of the tractor at this time. A Columbus County Deputy Sheriff and a North Carolina SBI Agent had observed marijuana plants growing in the field and stored in nearby tobacco barns during their three-day stakeout immediately preceding the arrests. On the day defendants were arrested, SBI Agent Bryan Deans took various samples of green vegetable materials from the field defendants had been discing and from barns adjacent to the field. (At trial, these samples were stipulated to be marijuana.) Over 4,000 pounds of marijuana were found in three tobacco barns on the farm. Defendant Whitfield, after being advised of his rights, told SBI Agents Neil Godfrey and Tim Batchelor that he worked for Pou Elkins and had been promised \$25,000 for helping to plant, harvest and store the marijuana. Defendant McKoy told Agent Godfrey that he did not plant the marijuana but that he did agree to help harvest it. McKoy also told Agent Godfrey that he discussed splitting the \$250,000 value of the field three ways; that three weeks before his arrest he and two other persons harvested the corn and marijuana (picking the marijuana, then combining the rows just picked); and that after hauling the marijuana from the fields in tobacco trailers, he put the marijuana in three barns and nailed the doors shut.

After each defendant's motion for nonsuit was denied at the close of the State's case, defendant McKoy testified that he harvested corn, not marijuana, from the field; that he did not put any marijuana in the tobacco barns or nail the doors shut; that he did not know what marijuana looked like before his arrest; that he was paid \$2.90 an hour and had never been promised \$25,000; and that he never agreed to testify against Elkins. Defendant Whitfield testified that he had a shotgun with him because he was going hunting; that he did not know

State v. Whitfield

marijuana was in the field; and that he lied when he said Mr. Elkins promised him \$25,000 for harvesting the marijuana.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

D.F. McGougan, Jr., for defendant appellants.

BECTON, Judge.

By offering evidence, the defendants waived their motions for dismissal made at the close of the State's evidence, and thus presented for review on appeal only their motions challenging the sufficiency of the evidence which they made at the close of all the evidence. *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977); *State v. Mendez*, 42 N.C. App. 141, 256 S.E. 2d 405 (1979). In considering their motions, the trial court's sole function was to determine "whether a reasonable inference of the defendant[s'] guilt of the crime[s] charged [could] be drawn from the evidence," *State v. Smith*, 40 N.C. App. 72, 78-79, 252 S.E. 2d 535, 540 (1978), because "if more than a scintilla of evidence is presented to support the indictment[s], the case[s] must be submitted to the jury." *State v. Agnew*, 294 N.C. 382, 387, 241 S.E. 2d 684, 688 (1978).

Both defendants made extra-judicial admissions implicating themselves in the intentional harvesting and cutting of marijuana. While a conviction cannot be sustained upon a naked extra-judicial confession, "[a] confession will be sufficient to carry the case to the jury when the State offers such extrinsic corroborative evidence as will, when taken in connection with the confession, establish that the crime was committed and that the accused was the perpetrator of the crime." *State v. Green*, 295 N.C. 244, 248, 244 S.E. 2d 369, 372 (1978).

In this case, is there proof of the *corpus delicti* — that the crime charged has been committed by someone — when we consider the definition of "manufacture"? As set forth in G.S. 90-87(15), "[m]anufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally," *Id.* There was plenary evidence of the manufacture of marijuana, the *corpus delicti*, by someone (the growing, harvesting, drying, and storage of the contra-

State v. Stephens

band). Excluding the extrajudicial admissions, there was still evidence that the defendants, farm laborers in a rural area, were seen by various law enforcement officers operating and riding upon a tractor discing a field in which plants subsequently identified as marijuana, were growing and had been cut. Additionally, marijuana was being stored in three barns in close proximity to the areas where the defendants were tilling the soil. "When the State offers evidence of the *corpus delicti* in addition to defendant's extrajudicial confessions, defendant's motion to nonsuit is correctly denied." *State v. Young*, 287 N.C. 377, 391, 214 S.E. 2d 763, 773 (1975).

In this case we find

No error.

Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. BOBBY STEPHENS

No. 805SC997

(Filed 17 March 1981)

1. Jury § 3.1– improper method of jury selection – harmless error

Although the trial court erred when it failed to follow the procedure mandated by G.S. 15A-1214 for the selection of the jury, such error was not prejudicial to defendant where defendant did not exercise all of his peremptory challenges.

2. Jury § 8– failure to impanel jury

Failure to impanel the jury in violation of G.S. 15A-1216 and G.S. 15A-1221(3) constituted prejudicial error.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 13 December 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 3 March 1981.

Defendant was tried for a crime against nature allegedly committed in the New Hanover County Jail. The jury was selected by the following process. The court ordered 24 members of the jury panel to be seated on the first row of seats in the courtroom. The court then explained the charges against the defendant and the burden of proof involved. The court asked a

State v. Stephens

series of questions of the prospective jurors and one was replaced. The State conducted a *voir dire* but was not permitted any challenges at that time. The defendant then conducted a *voir dire*. After the defendant had concluded his *voir dire*, the State exercised three peremptory challenges. The jury was tendered to the defendant who exercised six peremptory challenges. The court then designated 12 of the remaining 15 veniremen to serve as the jury with the other three as alternates. The defendant was allowed to exercise two peremptory challenges as to the alternates. The court then directed that the record show the jury selection had taken 55 minutes. The record does not show that the jury was impaneled.

The defendant was convicted and appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Special Deputy Attorney General John R.B. Matthis and Assistant Attorney General James C. Gulick, for the State.

Jacqueline Morris-Goodson for defendant appellant.

WEBB, Judge.

[1] The court committed error when it did not follow the procedure mandated by G.S. 15A-1214 for the selection of the jury. It was also error not to impanel the jury. *See* G.S. 15A-1216.

In *State v. Harper*, 50 N.C. App. _____, 272 S.E. 2d 600 (1980) this Court held the defendant did not show prejudicial error in the superior court's failure to follow the mandate of G.S. 15A-1214 in selecting the jury. This Court reasoned that since the defendant did not exercise all his peremptory challenges, the jurors impaneled met with the defendant's approval. In the case sub judice, the defendant exercised six peremptory challenges but did not attempt to exercise an additional peremptory challenge. We hold that we are bound by *State v. Harper, supra*. We find no prejudicial error in the violation of G.S. 15A-1214.

[2] As to the failure to impanel the jury in violation of G.S. 15A-1216 and G.S. 15A-1221(3), we hold this was prejudicial error. As is stated in the Official Commentary to G.S. 15A-1216, jeopardy does not attach until the jury is impaneled. This is too critical to the rights of the defendant to say it is not prejudicial.

State v. Stephens

Although we have not reversed because of the failure to follow G.S. 15A-1214, we do not approve of this procedure. The General Assembly has mandated a procedure for selecting juries. It is the duty of the courts to follow the law as enacted by the General Assembly.

New trial.

Judges HEDRICK and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 MARCH 1981

CITY OF MT. HOLLY v. WALKER No. 8027SC651	Gaston (79CVS615)	Dismissed
MARKUSON v. MARKUSON No. 8015DC732	Orange (79CVD933)	Affirmed
MONCUS v. WILLIS No. 8017SC709	Surry (79CVS500)	Affirmed
SMITH v. SMITH No. 8018DC564	Guilford (76CVD4884)	Affirmed
STATE v. ALLEN No. 8021SC585	Forsyth (79CRS38670) (79CRS38810) (79CRS48256) (79CRS48258) (79CRS48262) (79CRS48264)	No Error
STATE v. BENNETT No. 8014SC972	Durham (79CRS26198)	No Error
STATE v. BERRY No. 805SC915	New Hanover (79CRS26651)	No Error
STATE v. BROOKS No. 8027SC929	Gaston (79CRS25398)	No Error
STATE v. BYRD No. 8012SC930	Cumberland (79CRS59769)	No Error
STATE v. CARVER No. 8030SC975	Haywood (79CRS7010)	No Error
STATE v. COLLINS No. 8021SC806	Forsyth (79CR9602) (79CR9603)	Affirmed
STATE v. CULBRETH No. 8020SC912	Richmond (80CRS2352)	No Error
STATE v. DIZOR No. 805SC879	New Hanover (79CRS14277)	No Error

STATE v. DOERNER No. 8020SC982	Moore (79CRS4436)	Affirmed
STATE v. ELDER No. 804SC938	Sampson (80CRS2439) (80CRS2681)	No Error
STATE v. HINES No. 804SC888	Onslow (80CR6147)	No Error
STATE v. JOHNSON No. 804SC680	Duplin (79CRS6740)	No Error
STATE v. JORDAN No. 803SC809	Pitt (79CRS13376)	No Error
STATE v. LONG No. 8019SC909	Randolph (79CRS7422)	Affirmed
STATE v. MCKENZIE No. 8021SC864	Forsyth (80CRS7848)	No Error
STATE v. OXENDINE No. 804SC914	Onslow (80CR5121) (80CR5127) (80CR5128)	Remanded
STATE v. SABIR No. 8015SC867	Orange (79CRS12611)	No Error
STATE v. SHAW No. 805SC818	New Hanover (79CRS22567)	Dismissed
STATE v. SHAW No. 805SC934	New Hanover (79CRS22669)	No Error
STATE v. TAYLOR No. 8019SC761	Cabarrus (79CR10316)	No Error
STATE v. WATSON No. 8011SC956	Johnston (80CRS873) (80CRS874)	No Error

FILED 17 MARCH 1981

BROWN'S CABINETS v. MFG. ENTERPRISES No. 804SC661	Duplin (79CVS417)	No Error
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COLVARD v. WILLIAMS No. 8023DC736	Ashe (78CVD141)	Affirmed
HUMMEL v. CARSON No. 803SC721	Carteret (78CVS462)	No Error
ROLLINS v. ROLLINS No. 8018DC727	Guilford (78CVD7084)	No Error
STATE v. ANDERSON No. 8019SC794	Rowan (80CRS1503)	No Error
STATE v. BUNTING No. 805SC1056	New Hanover (80CR07830)	No Error
STATE v. ELLERBEE No. 8011SC896	Johnston (79CRS16645)	No Error
STATE v. EURE No. 808SC935	Wayne (80CR3752)	No Error
STATE v. GURLEY No. 8020SC1022	Stanly (80CRS1217)	No Error
STATE v. HENSON & BARBER No. 8012SC1007	Cumberland (80CRS11012) (80CRS11014)	No Error
STATE v. MCRAE No. 8020SC951	Richmond (80CRS1810)	No Error
STATE v. OLDHAM No. 8016SC1002	Robeson (79CRS21512)	No Error
STATE v. OWENS No. 8027SC905	Cleveland (80CRS2087)	No Error
STATE v. REAMS No. 8015SC829	Alamance (79CRS16238)	No Error
STATE v. RICHARDSON No. 8021SC936	Forsyth (80CRS9259) (80CRS9338)	No Error
STATE v. SMITH No. 8020SC971	Union (80CRS3177)	No Error
STATE v. WALDEN No. 805SC1034	New Hanover (79CRS5118)	No Error

McNinch v. Henredon Industries

EDWARD F. McNINCH, EMPLOYEE, PLAINTIFF, v. HENREDON INDUSTRIES, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. 8010IC560

(Filed 7 April 1981)

1. Master and Servant § 93.2— workers' compensation — testimony as to intent — competency to show action within course of employment

In a workers' compensation proceeding to recover for injuries received by plaintiff while he was driving a truck as an assistant to defendant employer's regularly dispatched driver on an out-of-state trip to deliver furniture, testimony by the regularly dispatched driver that he intended to comply with defendant employer's regulations relating to carrying an unauthorized person in his truck in an emergency situation was competent on the question of whether plaintiff was acting within the course of his employment at the time of the accident.

2. Master and Servant § 94— workers' compensation — sufficiency of evidence to support findings

In a workers' compensation proceeding to recover for injuries received by plaintiff while he was driving a truck as an assistant to defendant employer's regularly dispatched driver on an out-of-state trip to deliver furniture, the evidence supported findings by the Industrial Commission that time was of the essence for delivering the furniture, that the regularly dispatched driver requested assistance from plaintiff so that the shipment would be timely delivered, and that plaintiff's rendering of assistance to the regularly dispatched driver would have made possible the timely delivery of the furniture to defendant employer's benefit.

3. Master and Servant § 55.6— workers' compensation — rendering assistance to regularly dispatched driver — injuries within course of employment

The evidence supported a determination by the Industrial Commission that plaintiff truck driver was acting within the course of his employment at the time he was injured in an accident while driving a truck as an assistant to defendant employer's regularly dispatched driver on a trip to Detroit to deliver furniture where it showed that plaintiff was employed as a truck driver by defendant employer; the driver who was assigned the Detroit trip reinjured his back while hooking up the trailer in preparation for the trip and felt that he would be unable to make the fourteen-hour trip and unload the truck alone; the regular driver asked a clerk in the shipping department to contact the dispatcher or to find another driver to go in his place, but the clerk was unable to do so; the regular driver knew that time was of the essence for delivering the furniture, that he had to arrive in Detroit no later than 7 a.m. on the next morning or the furniture would be refused until the following Monday morning, and that he would have to leave the terminal by 5 p.m. in order to make the trip by 7 a.m. the next morning; the regular driver requested that plaintiff assist him so that the furniture would be timely delivered; plaintiff agreed to assist the regular driver in return for an agreement by the regular driver to split his pay with the plaintiff and to drop plaintiff off in West Virginia on the way home so that plaintiff could pick up a

McNinch v. Henredon Industries

car; plaintiff and the regular driver left on the trip sometime after 5 p.m., and both plaintiff and the regular driver thought that they could make the trip within the required time; regulations of defendant employer forbade its drivers from carrying unauthorized passengers on hauls except in an emergency, and when a driver made such an exception he was required to turn in information regarding the surrounding circumstances to defendant employer at the conclusion of the trip; the regular driver intended to notify defendant employer that plaintiff had accompanied him on the trip upon his return from Detroit; and plaintiff was injured in an accident which occurred while plaintiff was driving the truck while following the usual route to Detroit, since the evidence was sufficient to support a determination that an emergency situation contemplated by defendant employer's regulations existed and that defendant employer implicitly authorized the haul in the manner in which it was carried out.

APPEAL by defendant from the opinion and award of the full Commission of the North Carolina Industrial Commission. Opinion and award entered 17 December 1979. Heard in the Court of Appeals 23 January 1981.

Plaintiff's case was heard by Dianne C. Sellers, Deputy Commissioner of the North Carolina Industrial Commission, on 13 March 1979. Both plaintiff and defendant put on evidence. The deputy commissioner made an award to plaintiff, and in her opinion made findings of fact. Those pertinent to this appeal are set out herein.

1. Plaintiff was hired by the defendant-employer as a long distance truck driver who hauled furniture and who had been so employed for 2½ to 3 years prior to October 6, 1977, on which date early in the morning plaintiff had just returned from a trip to Florida.
2. Thomas Wyatt, also a truck driver for the defendant-employer, was preparing in the late afternoon of October 6, 1977 for a 14-hour trip to Detroit. He had to leave by 5 p.m. in order to be able to deliver furniture by 7 a.m. on the following morning of October 7, 1977.
3. Eight weeks prior to this occasion, Wyatt had undergone back surgery, and on this particular afternoon at approximately 4:30 or 4:45 while preparing for the trip, he slipped as he was hooking a trailer which caused his back to hurt severely.
4. Wyatt went to the clerk in the shipping department from whom he obtained the bill of lading necessary for his trip,

McNinch v. Henredon Industries

informed her he had hurt his back, and requested she contact the fleet manager and dispatcher, Eugene Woods, whom she was unable to contact. He desired to ask for a driver to go in his place or for assistance. In addition, the clerk unsuccessfully tried to reach another driver, Ralph Morgan. Wyatt then asked Tommy Goforth, another driver who had come into the shipping department, to go in his place, but he refused.

5. Wyatt then left for his trip at approximately 5 p.m., conscious that he would have to leave the terminal by 5 p.m. in order to make the 14-hour trip by 7 a.m. the next morning. Time was of the essence for delivering the furniture. The dispatcher had impressed upon him the importance of arriving no later than 7 a.m. on Friday morning. Otherwise, the load would be refused until Monday morning, thus requiring the driver to wait over the weekend. In the past, several drivers had been late in their delivery to this particular retailer, thus causing a great amount of ill will.

6. Companies receiving the merchandise usually allow the truck drivers to hire outsiders to assist them in unloading the truck. However, this particular company had a strict policy forbidding the hiring of outsiders for the reason that the truck was actually backed inside the building. Without assistance of a coemployee Wyatt, with his ailing back, would have had to unload the truck alone, as well as make the 14-hour drive alone. Wyatt felt he could not make the Detroit trip, at least not alone.

7. After having begun the trip, but while still in Marion, Wyatt talked on his citizens band radio with the plaintiff, who was off duty. It was at this time that Wyatt informed the plaintiff of his back incident and requested plaintiff assist him in driving to Detroit and delivering the furniture so that the shipment would be timely delivered. The plaintiff asked Wyatt if he could be dropped off on the return trip from Detroit after making the delivery so that he could go to Wheeling, West Virginia, to pick up a car. Wyatt agreed to this and also offered to split his pay for the single operation with the plaintiff.

8. At the time the plaintiff and Wyatt started on the trip to Detroit, the dispatcher was not aware plaintiff was accom-

McNinch v. Henredon Industries

panying Wyatt. Both Wyatt and plaintiff had, and knew that other drivers had, doubled up and split the pay on previous occasions when only a single driver was dispatched.

9. In each truck the defendant-employer provides a manual which contains regulations for the drivers. One provision forbids a driver to carry unauthorized passengers. The only authorized passengers are those with a written pass signed by company officials. Drivers found violating this rule are subject to dismissal. Exceptions to this rule are allowed only in cases of emergency, and at the end of the trip the driver is to turn in information regarding the circumstances. Wyatt intended to comply with this rule on returning from Detroit. It can be said that here a situation of emergency existed in that Wyatt had reinjured his back and the need to depart immediately in order to make a timely arrival in Detroit and the unsuccessful efforts to locate the dispatcher or other assistance ruled out the usual procedures for obtaining permission to engage assistance.

10. Wyatt drove from Marion, North Carolina to Knoxville, Tennessee, where the plaintiff began driving. An accident occurred involving this truck while the plaintiff was driving and Wyatt was asleep near Finley, Ohio on Interstate 75 which was the normal route to Detroit.

11. As a result of the truck accident, plaintiff sustained the following injuries: cerebral concussion, lacerations of the forehead and chin, two perforations in the upper jejunum, and lacerations in the mesentery. Drs. R.P. Pai and R.J. Stern treated the plaintiff during the stay in the hospital in Ohio. Dr. Joseph Y. Chung of Marion, who followed the patient after his return to North Carolina, discharged him on December 8, 1977. There is no evidence of plaintiff sustaining a permanent partial disability. The medical report is unclear as to whether plaintiff had reached maximum medical improvement at this time and was able to return to work. His first day at work following the truck collision was January 2, 1978.

12. Wyatt received injuries in the truck collision and was out of work for a period of time. He was allowed to return to his job as truck driver and was not dismissed as a conse-

McNinch v. Henredon Industries

quence of requesting and taking the plaintiff with him to Detroit for assistance, nor as a consequence of being in the trucking accident.

13. On October 7, 1977, plaintiff sustained an injury by accident which arose out of and in the course of his employment with the defendant-employer when the truck in which he was driving as an assistant to the regular dispatched driver was involved in a collision. Though the plaintiff stood to personally benefit from going with Wyatt since he was to be dropped off on the return trip in order to go on a personal errand in West Virginia, the act of plaintiff's assisting Wyatt would have made possible a timely delivery, had it not been interrupted, when it otherwise would have been an impossibility. It was clearly to the defendant-employer's advantage for the shipment to arrive promptly and to avoid further hostility with the retailer. Plaintiff's acts benefitted the defendant-employer to such an appreciable extent as to bring his activity regarding the trip to Detroit within the scope and course of his employment. Plaintiff's aid furthered the defendant employer's business.

Upon the facts found, the deputy commissioner concluded that plaintiff

"... sustained an injury by accident which arose out of and which was within the scope and course of his employment when he acted to benefit the defendant-employer to such an appreciable extent as to outweigh any personal benefit which he might have received. GS Sections 97-2; *Guest v. Brenner Iron & Metal Co.*, 241 NC 448, 85 SE 2d 596 (1955).

On appeal to the full Commission, the award was affirmed (with insignificant modifications in the facts found), the Commission stating that it was "of the opinion that the correct result was reached in regard to compensability."

Defendant appealed the decision of the full Commission to this Court.

Richard G. Miller for plaintiff appellee.

Hedrick, Feerick, Eatman, Gardner and Kincheloe, by J.A. Gardner, III, for defendant appellant.

MORRIS, Chief Judge.

McNinch v. Henredon Industries

Defendant brings forth thirteen assignments of error on appeal. Assignments of error Nos. 4 and 9 are not argued by defendant in his brief. Therefore, these are deemed abandoned pursuant to Rule 28(b)(3); Rules of Appellate Procedure.

[1] Defendant charges in its first assignment of error that the deputy commissioner erred in overruling its objection to a question posed by plaintiff at the original hearing to witness Wyatt. The question and testimony to which defendant objected were in reference to defendant's regulation which forbade drivers from carrying unauthorized passengers in their trucks without company approval. The question and contextual testimony read as follows:

Mr. Wyatt was then handed papers and recognized them as the regulations for drivers. On page 17 at the bottom of the page is a paragraph entitled "In the Truck, paragraph 2" which states as follows: "Any truck carrying unauthorized passengers is illegal and contrary to the insurance company rules and is prohibited in this company. Drivers found violating this rule are subject to dismissal. The only authorized passengers are those with written passes signed by company officials. Exceptions to this rule will be allowed only in cases of emergency. The name of the person, where and why they were picked up, and where they were taken should be turned in with your bills at the end of the trip." I knew that rule before this trip. The only way I could get the stuff up there was to take Mr. McNinch with me.

Q. Was it your intention to comply with this rule?

MR. GARDNER: Objection.

A. Yeah.

THE COURT: Overruled.

EXCEPTION NO. 1.

When I got back, I was going to inform Mr. Wood as to what I had done and I also tried to get hold of him before.

Defendant contends that the question was incompetent, irrelevant, leading and called for a conclusion by the witness. Defendant takes the position that Wyatt's state of mind was irrelevant to the issues of this case, that only plaintiff's state of mind was relevant as to whether he was acting within the

McNinch v. Henredon Industries

course of his employment and in compliance with defendant's regulations.

We do not agree. Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. 1 Stansbury, N.C. Evidence 2d, § 77 (Brandis rev. 1973). There should be a reasonable connection between the evidence and the fact to be proved by it. However, the evidence need not bear directly on the issue.

It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact. (Citation omitted.)

State v. Arnold, 284 N.C. 41, 47-48, 199 S.E. 2d 423, 427 (1973).

In determining whether plaintiff was acting within the course of his employment at the time this accident occurred, the issues narrow to the question of whether the truck drivers were acting in compliance with defendant's regulations. Wyatt's testimony with regard to whether he was acting, or intended to act, in compliance with the regulations was relevant to this issue.

Wyatt was basically responsible for carrying out this haul. It was Wyatt who would suffer the consequences if this load was late arriving in Detroit. Plaintiff was a passive participant who agreed to help his co-employee get the job done properly. The major decisions in this instance had to be made by Wyatt. It was up to Wyatt whether to attempt to make the Detroit deadline. It was his decision that circumstances warranted his carrying plaintiff along on the trip without first notifying the dispatcher. It was his decision that the situation merited being treated as an emergency so that defendant's ordinary rules could be suspended. The question was posed to Wyatt for the purpose of showing that this was an emergency situation within the rules of the drivers policy manual, which justified Wyatt in allowing plaintiff to aid him with this haul. Therefore, we think the question addressed to Wyatt as to whether he intended to comply with these rules was relevant. There was a reasonable relationship between the question asked and the issue of whether plaintiff was acting within the course of his

McNinch v. Henredon Industries

employment.

Although the question was leading, we discern no abuse of discretion requiring reversal. *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). We are of the opinion that the deputy commissioner did not abuse her discretion by allowing plaintiff's question. The question functioned to clarify for the tribunal the point which the witness was trying to convey.

Nor do we think plaintiff's question usurped the decision making province of the fact finder. Plaintiff asked Wyatt what his intentions were in carrying out his actions. Plaintiff was not asking the witness for an opinion. The jury was left free to determine for itself what Wyatt's true intentions were from the evidence of the events surrounding the incident and the actions Wyatt took as from his testimony.

Defendant assigns error to six portions of the findings of fact as adopted by the Commission. In each of these assignments of error defendant claims that the specified findings of fact are not supported by competent evidence in the record, and that each is against the greater weight of the evidence.

The standard by which the Industrial Commission is required to examine the evidence before it in order to draw its conclusions therefrom was well summarized by Judge Brock, later Chief Judge, in *West v. Stevens*, 6 N.C. App. 152, 169 S.E. 2d 517 (1969).

It is well established that the findings of fact by the Industrial Commission are conclusive and binding upon the courts when supported by competent evidence. *Taylor v. Jackson Training School*, 5 N.C. App. 188, 167 S.E. 2d 787. Also, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Taylor v. Jackson Training School*, *supra*.

In its consideration of claims the Industrial Commission is not compelled to find in accordance with testimony of any particular witness; its function is to weigh and evaluate the entire evidence and determine as best it can where the truth lies.

McNinch v. Henredon Industries

Defendant first assigns error to the use of the word "severely" in finding of fact No. 3. Defendant seems to contend that the commissioner found that Wyatt injured his back "severely" when he hooked up the trailer. The finding was, however, that his slipping while hooking the trailer "caused his back to hurt severely." There is considerable difference in meaning, and the evidence does support a finding that Wyatt's back hurt "severely." In any event, the full Commission deleted the word "severely" from finding of fact No. 3, so defendant's position is not well taken.

Defendant complains that several of the Commission's findings of fact which were based upon the premise that it would be possible for Wyatt and plaintiff to reach the customer in Detroit by the seven a.m. deadline on the seventh were in error. Defendant's position is that in consideration of the time at which Wyatt and plaintiff departed from Marion it was impossible for them to reach their destination on time. If, as defendant argues, the evidence showed it was impossible for the drivers to meet their deadline, this would contradict several of the findings of fact upon which the Commission's ultimate conclusion that an emergency situation did exist was based.

[2] In summary, defendant complains that the following findings of fact were not supported by the evidence: In a portion of its fifth finding of fact the Commission found that, "[t]ime was of the essence for delivering the furniture;" as part of its seventh finding of fact the Commission found that Wyatt requested assistance from plaintiff, "so that the shipment would be timely delivered;" the Commission found in its thirteenth finding that plaintiff's rendering of assistance to Wyatt would have made possible the timely delivery of the furniture to defendant's benefit. Defendant contends that because the evidence shows that it was impossible for the drivers to reach their destination on time, these findings of fact are necessarily erroneous.

Defendant argues that the only competent evidence of record reflects that Wyatt and plaintiff, working together, could not have possibly reached Detroit by the seven a.m. appointment. It contends that the evidence shows that the trip to Detroit normally took approximately fourteen hours, and the pair of drivers did not leave Marion together until some uncertain time after five p.m. on 6 October 1977. Therefore, it was

McNinch v. Henredon Industries

impossible for them to have reached Detroit by seven a.m. the next morning.

We disagree. There was evidence in the record to support a finding that it was possible for Wyatt and plaintiff to reach their destination on time. The record indicates, at least, by inference, that plaintiff and Wyatt both thought that they could reach their destination on time if they departed from Marion when they did. Had Wyatt left the Marion terminal at five p.m., this would have given him precisely fourteen hours from the time of departure until the appointed time of arrival. We note that the fourteen hours was an approximation of the necessary time. Intervening extraneous factors in the individual trip could create variations in the time either way.

The evidence shows that after leaving the terminal at five p.m. Wyatt talked with plaintiff on his citizens band radio, and asked for his assistance. Wyatt then met plaintiff at the Sugar Hill Truck Stop to discuss the trip, and later picked up plaintiff at his home after he had showered and packed fresh clothes. There is no direct evidence of how long this course of events took, or at what time the drivers actually departed for Detroit.

Wyatt had made deliveries to the same customer in Detroit in the past "over 25 times". Plaintiff had also made deliveries to this destination on two or three previous occasions. Obviously, both should have been familiar with the route and the amount of time needed to complete the trip. It is a fair assumption that both drivers thought they could leave Marion at the time they eventually did, and still reach Detroit on time.

With these factors in mind, we think there were sufficient facts from which the Commission could conclude that it was possible, albeit difficult, for Wyatt and plaintiff to reach their destination on time. This being so, this determination supports the premise upon which the Commission based these three disputed findings of fact. Therefore, we hold that these three findings of fact were supported by evidence in the record.

Furthermore, with regard to the Commission's finding that, "[t]ime was of the essence for delivering the furniture" the record contains more substantiation. The evidence shows that the dispatcher had impressed upon Wyatt the importance of arriving at the retailer's in Detroit no later than the appointed

McNinch v. Henredon Industries

time the following morning. Otherwise, the load of furniture would be refused until the following Monday morning. Plaintiff and Wyatt were aware that in the past defendant's drivers had been delinquent in the deliveries to this particular customer, causing ill feelings between defendant and this customer.

Wyatt testified with regard to whether it was his impression that time was of the essence in making this delivery as follows:

I knew that if I waited long enough I could get up with Mr. Wood and he would take care of things, but I didn't have time. It was 5:00. I had a 7:00 appointment. I had to go. I knew Mr. Woods could take care of that if I called him but Mr. Woods told me to be there and I had no choice except to go.

This evidence adequately supports the contested finding of fact.

Defendant submits that the Commission erred in adopting the portion of finding of fact No. 8 in which the deputy commissioner found that, "[b]oth Wyatt and Plaintiff had, and knew that other drivers had, doubled up and split the pay on previous occasions when only a single driver was dispatched."

On redirect examination, plaintiff testified: "I do know firsthand that drivers double up with the company." Similarly, Wyatt testified that: "To my knowledge they have had some double operations. In fact, I run double myself." This testimony does not indicate that plaintiff, himself, had actually ever run double, but it does show that he was aware of the practice. Any error resulting from the Commission's finding that both plaintiff and Wyatt had run double was not prejudicial. It is obvious from this testimony that running double was not an uncommon practice among defendant's drivers. This assignment of error is overruled.

Defendant maintains that there was insufficient evidence to support the portion of finding of fact No. 9 in which the Commission found that Wyatt acted with the intention to comply with defendant's regulations. Previously, we have discussed the circumstances under which Wyatt was acting. It is unnecessary to recite that evidence here. Those circumstances support the conclusion that Wyatt was faced with an emergency situation that justified his disregard of defendant's normal rules of

McNinch v. Henredon Industries

operation. Furthermore, Wyatt testified that he acted with the intention of complying with defendant's rules. We have already held that this testimony was relevant and admissible. We think this evidence adequately supports the contested finding of fact.

[3] The major issue presented by this appeal is whether plaintiff was acting within the course and scope of his employment at the time the accident occurred. Defendant contends that the Commission was in error when it concluded as a matter of law that the injuries plaintiff sustained arose out of and in the course of plaintiff's employment. Defendant argues that there was no competent evidence to support such a conclusion, and that such a conclusion under the facts of this case was contrary to the laws of this State.

It is defendant's position that at no time during the course of events leading up to and including the accident was plaintiff acting within the course of his employment. He contends that this is so because plaintiff ignored the prohibitions of his employer, failed to attempt to obtain authorization from defendant to accompany Wyatt on the trip, undertook the trip on condition that he obtain personal benefits from it, had no expectation of receiving pay for his assistance, and had no authorization although he knew that it was required and knew that he was off duty at all times during that weekend.

In conjunction with its argument that the Commission's conclusions of law were contrary to the law, defendant asserts that conclusions of law Nos. 1, 2 and 4 were not properly supported by findings of fact. However, in his brief defendant does not specifically address the position he takes in his assignments of error with regard to whether these conclusions of law were supported by the findings of fact. Therefore, we deem those contentions to be abandoned.

In *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955), Justice Bobbitt, later Chief Justice, summarized the law of torts with respect to what constitutes acting within the scope of one's employment as follows:

The Act [Workman's Compensation Act] "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation," *Johnson v. Hosiery Co.*, 199 N.C. 38, 153 S.E. 591; but "the rule of liberal construction cannot be employed to

McNinch v. Henredon Industries

attribute to a provision of the act a meaning foreign to the plain and unmistakable words in which it is couched," *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760.

"Acts of an employee for the benefit of third persons generally preclude the recovery of compensation for accidental injuries sustained during the performance of such acts, usually on the ground they are not incidental to any service which the employee is obligated to render under his contract of employment, and the injuries therefore cannot be said to arise out of and in the course of the employment. . . . However, where competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment, or such as would prove beneficial to his employer's interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a casual connection between the employment and the accident may be established." *Schneider*, 7 Workmen's Compensation Text, sec. 1675.

As stated by Larson: "If the ultimate effect of claimant's helping others is to advance his own employer's work, by removing obstacles to the work or otherwise, it should not matter whether the immediate beneficiary of the helpful activity is a co-employee, an independent contractor, an employee of another employer, or a complete stranger." 1 *Larson's Workmen's Compensation Law*, sec. 27.21.

Decisions in other jurisdictions cited by these text writers, some tending to support plaintiff's position and others tending to support defendant's position, disclose factual situations somewhat similar yet different in some material feature from the case now before us. Basically, whether plaintiff's claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose or that of a third person.

241 N.C. at 452, 85 S.E. 2d at 599-600.

Upon examination of the facts of the case we think that plaintiff was acting within the scope of defendant's regulations,

McNinch v. Henredon Industries

when under these circumstances he departed on this trip. Through its regulations defendant can be said to have implicitly authorized the haul in the manner in which it was carried out. Defendant's regulations forbade its drivers from carrying unauthorized passengers on hauls. However, exceptions were made to this rule in case of emergencies. What constituted an emergency is not made clear or specified in the regulations contained in the record. Under the regulations, when a driver makes such an exception he is required to turn in information regarding the surrounding circumstances to defendant at the conclusion of the trip. Wyatt testified that it was his intention to comply with defendant's regulations, and that he intended to notify defendant that plaintiff had accompanied him on the trip upon returning. It can reasonably be said that in these circumstances an emergency situation like that referred to in defendant's regulations existed. Wyatt had reinjured his back, and the need to depart immediately in order to make a timely arrival in Detroit, along with the unsuccessful efforts to locate the dispatcher or other assistance, ruled out the usual procedures for obtaining permission to engage assistance. This customer required special promptness from defendant's drivers.

Plaintiff stood to benefit personally by accompanying Wyatt, because he was to be dropped off on the return trip to do a personal errand in West Virginia. The record does not show that in an emergency such as this, allowing an unauthorized passenger to perform a personal errand on the return trip would violate defendant's regulations. In view of the fact that plaintiff was the only driver whom Wyatt could locate who would agree to accompany him, the agreement to deviate from the normal procedure on the return trip certainly appears to have been reasonable. We note that prior to the occurrence of the accident no deviation had been made in the usual route.

Based on these facts, we think there was sufficient evidence upon which the Commission could conclude as a matter of law that in accompanying Wyatt on this trip plaintiff was acting within the course of his employment. His actions were in accord with the emergency exception to defendant's regulations. Therefore, plaintiff's actions were authorized by defendant.

We have found that the Commission's findings of fact were adequately supported by evidence in the record. The facts as found by the Commission, when considered in the light most

Cunningham v. Brown

favorable to plaintiff, support the Commission's ultimate conclusion of law that plaintiff was injured by accident arising out of and in the course of his employment.

Affirmed.

Judges VAUGHN and BECTON concur.

LANCE R. CUNNINGHAM AND WIFE, PAMELA H. CUNNINGHAM v.
LOUISE JOHNSON BROWN

No. 801SC475

(Filed 7 April 1981)

1. Appeal and Error § 6— order adjudicating fewer than all claims — appealability

In an action by husband and wife to recover for damages sustained in an automobile accident with defendant, the trial court's order dismissing the wife's claim, though it adjudicated the rights and liabilities of fewer than all of the parties, was immediately appealable under G.S. 1-277 and G.S. 7A-27, because the order disposed of all claims asserted by the wife, denied her a jury trial on her claim against defendant, and therefore affected a substantial right.

2. Torts § 7.2— automobile accident — avoidance of release — evidence of fraud or mutual mistake

In an action to recover damages for injuries sustained by plaintiff wife in an automobile accident, trial court erred in dismissing plaintiff wife's claim on the basis of a release given to plaintiff husband's insurer in exchange for \$4,975.00, and the trial court erred in excluding "on the grounds of the parol evidence rule" an affidavit by which plaintiff wife attempted to show that the release, which purported to release "[plaintiff husband] and any other person, firm or corporation charged or chargeable with responsibility or liability" arising out of the accident, was procured by fraud or executed pursuant to a mutual mistake of fact, because the affidavit alleged the time the purported fraud was committed, 10 August 1978, when plaintiff wife expected to re-enter the hospital for medical procedures necessitated by the accident; it alleged the place, plaintiff wife's home in Massachusetts; it alleged the content of the alleged fraudulent representation, that her dealings with plaintiff husband's insurer would not affect any suit by plaintiff wife against the other party involved in the accident; and it alleged what was obtained as a result, plaintiff wife's signature on a document which purported to release any person or firm charged or chargeable with liability arising out of the accident. Furthermore, the facts alleged in plaintiff wife's affidavit would permit a finding that she and an insurance adjuster agreed and intended to release only plaintiff husband; the document signed contained language contrary to this mutual agreement and intention in that by

Cunningham v. Brown

its terms it released other joint tortfeasors as well as plaintiff husband; it therefore failed to achieve the result which could be found to have been agreed to and intended by both parties; and it thus raised a genuine issue of fact as to whether the release was executed under circumstances amounting to mutual mistake.

APPEAL by plaintiff Pamela H. Cunningham from *Brown*, Judge. Order entered 19 March 1980 in Superior Court, DARE County. Heard in the Court of Appeals 11 November 1980.

Plaintiffs filed a complaint against defendant alleging the following: Plaintiffs resided in Massachusetts and defendant resided in North Carolina. On 9 September 1977 plaintiff Lance R. Cunningham (hereinafter "plaintiff-husband") was driving a motorcycle on which plaintiff Pamela H. Cunningham (hereinafter "plaintiff-wife") was a passenger. The plaintiffs were traveling north on U.S. Highway 158 in Currituck County, North Carolina. Defendant was also traveling north on Highway 158 ahead of plaintiffs, separated from them by a tractor-trailer. As plaintiff-husband passed the tractor-trailer defendant turned from her right lane of travel into her left lane of travel and into the path of plaintiffs' motorcycle, resulting in a collision. Plaintiffs sought recovery for numerous bodily injuries, loss of wages, and impairment of earning capacity.

Defendant submitted a request for admissions and interrogatories in which she asked plaintiffs to admit that Allstate Insurance Company, insurer for plaintiff-husband, had paid plaintiff-wife \$4,975.00; and that plaintiff-wife, in consideration of the \$4,975.00, had signed a release which defendant attached to the request for admissions. Plaintiffs failed to answer the request for admissions and interrogatories.

Defendant subsequently filed an answer and counterclaim denying her own negligence and asserting the negligence of both plaintiffs. She also moved for summary judgment seeking dismissal of plaintiff-wife's claim, relying upon the pleadings and request for admissions, the matters in the request for admissions being deemed admitted by plaintiff-wife's failure to answer. G.S. 1A-1, Rule 36. Plaintiff-wife submitted an affidavit in opposition to defendant's motion. She admitted signing a document when she received the check for \$4,975.00, but stated that she did not recall the full contents of the document. She stated that she did not receive a copy of the document, and that

Cunningham v. Brown

at the time she thought she was signing a receipt for the check. She further asserted: "The adjuster did come, with a check and a document for my signature. He asked me whether I was suing the other party involved in the accident and I replied that this was none of his business. To this he responded that our dealings 'would not affect that anyway'."

The trial court excluded plaintiff-wife's affidavit on ground of the parol evidence rule, granted defendant's motion and dismissed plaintiff-wife's claim. Plaintiff-wife appealed.

Twiford, Trimpi, Thompson and Derrick, by C. Everett Thompson, for plaintiff-appellant.

Leroy, Wells, Shaw, Hornthal, Riley and Shearin, by L.P. Hornthal, Jr., for defendant-appellee.

WHICHARD, Judge.

[1] We note initially that the court's order adjudicates fewer than all of the claims and adjudicates the rights and liabilities of fewer than all of the parties. Although defendant does not raise the issue of appealability, the appellate court should dismiss the appeal on its own motion if plaintiff-wife has no right to appeal. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 388 (1978). An order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is reviewable only under two sets of circumstances. First, Rule 54(b) specifically provides that if the judge entering the order determines that there is "no just reason for delay" and includes a statement to that effect in the judgment, the judgment will be final and immediately appealable. G.S. 1A-1, Rule 54(b). Second, if the interlocutory order "affects a substantial right" of the party appealing or "in effect determines the action and prevents a judgment from which an appeal might be taken" the party has a right to appeal under G.S. 1-277 or G.S. 7A-27. See *Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977); *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980) (contains a discussion of the North Carolina cases on appealability as affected by Rule 54(b) and a diagram for determining where a case fits within the appealability framework).

The order appealed from in the case *sub judice* does not

Cunningham v. Brown

state that the judge found no just cause for delay. Consequently, the order is not an immediately appealable "final judgment" under Rule 54(b); and we must determine whether it is appealable under G.S. 1-277 or G.S. 7A-27. G.S. 1-277 provides, in pertinent part:

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

G.S. 1-277(a) (Supp. 1979). Although the order here did not dispose of the entire lawsuit, it did dispose of all claims asserted by plaintiff-wife. Had plaintiff-wife not joined her claims against defendant with those of plaintiff-husband, the order granting summary judgment against her would have been a final judgment in the case. Because plaintiffs did join their claims, the order was interlocutory in the sense that it did not dispose of the cause as to all parties. See *Veazey v. Durham*, 231 N.C. 357, 361-362, 57 S.E. 2d 377, 381 (1950).¹ The order, however, denied plaintiff-wife a jury trial on her claim against defendant and, therefore, affected a substantial right. See *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976). See also *Industries, Inc., v. Insurance Co.*, 296 N.C. 486, 493, 251 S.E. 2d 443, 448 (1979) (where the court discussed its holding in *Nasco*). It "in effect determines the action" as to her claim against defendant. We hold, therefore, that the summary judgment dismissing plaintiff-wife's claim is immediately appealable under G.S. 1-277 and G.S. 7A-27.

¹Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders. G.S. 1-208 [now repealed, but replaced in substance by G.S. 1A-1, Rule 54]. A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. [Citations omitted.] An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. [Citation omitted.]

Veazey v. Durham, 231 N.C. 357, 361-362, 57 S.E. 2d 377, 381 (1950) (opinion by Justice Ervin).

Cunningham v. Brown

The court based its ruling here on the release of plaintiff-husband, a Massachusetts resident, executed in the State of Massachusetts by plaintiff-wife, a Massachusetts resident, and delivered in that state to her husband's insurer. The parties have not raised the conflict of laws questions presented by this state of facts. Under G.S. 8-4 and *Arnold v. Charles Enterprises*, 264 N.C. 92, 141 S.E. 2d 14 (1965), however, we are required to take judicial notice of foreign law, even in the absence of reference thereto by the parties, when foreign law governs the action.

Generally, North Carolina adheres to the *lex loci contracti* rule, which holds that the law of the state in which a contract was formed governs matters of execution, validity, and interpretation. *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967); *Davis v. Davis*, 269 N.C. 120, 152 S.E. 2d 306 (1967). With regard to the validity of a release interposed as a defense to a tort claim, however, some jurisdictions follow the rule in Restatement (Second), Conflict of Laws § 170 (1971) which is that the law of the place of injury controls. See e.g., *Bittner v. Little*, 270 F. 2d 286, 288 (3d Cir. 1959); *Kussler v. Burlington Northern, Incorporated*, 606 P. 2d 520 (Mont. 1980). The Restatement rule has been criticized both as not founded on sound legal principle or decision and as producing the absurd result of "deny[ing] effect to the parties' . . . intention by applying the law of the — clearly fortuitous — place of accident." Ehrenzweig, *Releases of Concurrent Tortfeasors in the Conflict of Laws: Law and Reason Versus the Restatement*, 47 U.Va.L.Rev. 712, 713 (1960). (criticizes original Restatement, but rule is the same).

Our research indicates that the law of Massachusetts, *lex loci contracti*, and that of North Carolina, *lex loci delicti*, do not differ with respect to the substantive questions involved here. ² "There would be no profit, then, for us to exercise ourselves here to determine which law is to be applied, for to do so would take us into a 'highly complex and confused part of

²*Compare Spritz v. Lishner*, 355 Mass. 162, 243 N.E. 2d 163 (1969) and *Canney v. New England Tel. & Tel. Co.*, 353 Mass. 158, 228 N.E. 2d 723 (1967) with *Craig v. Kessing*, 297 N.C. 32, 253 S.E. 2d 264 (1979) and *MacKay v. McIntosh*, 270 N.C. 69, 153 S.E. 2d 800 (1967) and *Fox v. Southern Appliances*, 264 N.C. 267, 141 S.E. 2d 522 (1965) regarding parole evidence.

Compare King v. Motor Mart Garage Co., 336 Mass. 442, 146 N.E. 2d 365 (1957) and *Century Plastic Corp. v. Tupper Corp.*, 333 Mass. 531, 131 N.E. 2d 740 (1956) with *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5 (1943) and *Cheek v. R.R.*, 214 N.C. 152, 198 S.E. 626 (1938) regarding reformation of contracts.

Cunningham v. Brown

conflict of laws.” *Arnold*, 264 N.C. at 97, 141 S.E. 2d at 17. We conclude that the questions presented by this appeal can properly be determined by reference to the law of North Carolina.

[2] We turn, then, to the questions presented. The trial court granted summary judgment for defendant, dismissing plaintiff-wife’s claim, on the basis of a release given to plaintiff-husband’s insurer in exchange for the sum of \$4,975, which release defendant pled in bar of plaintiff-wife’s claim. Plaintiff-wife, by her failure to answer defendant’s request for admissions regarding the release, is deemed to have admitted its execution for the consideration alleged as well as its content. G.S. 1A-1, Rule 36. The instrument provided that plaintiff-wife

release[d] and forever discharge[d] LANCE CUNNINGHAM [plaintiff-husband] *and any other person, firm or corporation charged or chargeable with responsibility or liability* . . . from any and all claims . . . particularly on account of all personal injury, disability . . . loss or damages of any kind already sustained or that [she] may hereafter sustain in consequence of [the accident]. (Emphasis supplied.)

Nothing else appearing this instrument constituted a bar to plaintiff-wife’s claim, because “[a] release executed by the injured party and based on a valuable consideration is a complete defense to an action for damages for the injuries.” *Caudill v. Manufacturing Co.*, 258 N.C. 99, 102, 128 S.E. 2d 128, 130 (1962), *quoting from*, *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5 (1943). Not only did the instrument release plaintiff-husband; but because of the language “and any other person, firm or corporation charged or chargeable with responsibility or liability,” nothing else appearing, it also released all “other entities involved in the occurrence which produced the settlement with one participant that led to the release,” including defendant. *Battle v. Clanton*, 27 N.C. App. 616, 619, 220 S.E. 2d 97, 99 (1975), *review denied*, 289 N.C. 613, 223 S.E. 2d 391 (1976). It thus became “necessary for the plaintiff (releasor) to prove . . . matter in avoidance” of the release. *Caudill*, 258 N.C. at 102, 128 S.E. 2d at 130.

A release, like any other contract, is subject to avoidance by a showing that its execution resulted from fraud or mutual mistake of fact. *See Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5 (1943) (fraud); *Cheek v. R.R.*, 214 N.C. 152, 198 S.E. 626 (1938)

Cunningham v. Brown

(mutual mistake); 1 Williston, Contracts § 15 at 28 (3d ed. 1957). This rule of contract law is founded on the proposition that there can be no contract without a meeting of the minds; and that when a contract is executed under circumstances amounting to fraud or mutual mistake, the requisite meeting of the minds does not occur. Thus, plaintiff-wife here could avoid the effect of the release pleaded by defendant in bar of her claim by showing that the release was procured under circumstances amounting to fraud or mutual mistake.

This she sought to do by the introduction of the affidavit which the trial court excluded. The trial court specifically stated in its order allowing defendant's motion for summary judgment that the objection to introduction of the affidavit was made "on the grounds of the parol evidence rule." This rule, which is a rule of substantive law, provides that a written contract cannot be contradicted by evidence of prior or contemporaneous negotiations or conversations. *Craig v. Kessing*, 297 N.C. 32, 34, 253 S.E. 2d 264, 265 (1979). It in effect establishes a presumption that the writing accurately reflects the matters on which the minds of the parties ultimately met.

The parol evidence rule does not, however, preclude admission of extrinsic evidence when one of the parties seeks to prove that a written agreement was executed under circumstances amounting to fraud or mutual mistake. *MacKay v. McIntosh*, 270 N.C. 69, 153 S.E. 2d 800 (1967) (mutual mistake); *Fox v. Southern Appliances*, 264 N.C. 267, 141 S.E. 2d 522 (1965) (fraud). In these circumstances the offering party does not seek to contradict a written agreement, but seeks to show the existence of facts which prevented a meeting of the minds and the consequent formation of a contract. *MacKay*, 270 N.C. at 73, 153 S.E. 2d at 804. The question presented, then, by plaintiff-wife's assignment of error to the exclusion of her affidavit on the ground of the parol evidence rule, is whether the facts contained in the affidavit sufficiently raised issues of fraud or mutual mistake in the execution of the release. If so, pursuant to the rule permitting extrinsic evidence to demonstrate the existence of fraud or mistake, the affidavit should have been admitted for the purpose of showing matter in avoidance of defendant's plea of the release as a bar to plaintiff-wife's claim. We thus consider the factual allegations contained in the affidavit to determine their sufficiency for this purpose.

Cunningham v. Brown

The allegations were as follows: Following the September 1977 accident and a period of hospitalization in Elizabeth City, North Carolina, plaintiff-wife returned to her home in Massachusetts. In October 1977 an adjuster from Allstate Insurance Company notified her that \$5,000.00 was available from her husband's motorcycle insurance policy to pay her medical expenses and lost wages. The adjuster visited her and took a statement on 2 November 1977. Plaintiff-wife submitted several small bills to Allstate, one of which it paid. She was to have a rod in her femur removed in August 1978, and as that date approached she became worried about paying the expected medical expenses. She contacted Allstate regarding the \$5,000.00 fund, and a second adjuster visited her in her home on 10 August 1978. The adjuster had with him a check and a document for her signature. He asked whether plaintiff-wife intended to sue the other party to the accident. When she answered that it was none of his business, the adjuster stated that the dealings between plaintiff-wife and Allstate "would not affect that anyway." Plaintiff-wife signed the document, the full content of which she did not recall except that it contained her husband's name. She did not receive a copy of the document she signed. She "regarded the signing of the document as a receipt for the funds payable to [her] for medical bills and lost wages," and she "certainly had no intention, in signing it, to release the defendant in this action."

In considering whether these allegations sufficiently presented an issue as to whether the affidavit was executed as a result of fraud or mutual mistake, although the affidavit is not a "pleading" in the technical sense, we nevertheless find instructional our Supreme Court's interpretation of the pleading particularity requirement of North Carolina Rules of Civil Procedure, Rule 9(b). This rule requires that "[i]n all averments of fraud . . . or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." G.S. 1A-1, Rule 9(b). The Supreme Court recently observed, however, that the requirement of particularity in Rule 9(b) "must be reconciled with our Rule 8 which requires a short and concise statement of claims" and with the general "notice pleading" theory of the Rules of Civil Procedure. *Terry v. Terry*, 302 N.C. 77, 84, 273 S.E. 2d 674, 678 (1981). The Court also stated that "in pleading actual fraud the particularity requirement [of Rule 9(b)] is

Cunningham v. Brown

met by alleging time, place and content of the fraudulent representation and what was obtained as a result of the fraudulent acts or representations." *Terry*, 302 N.C. at 85, 273 S.E. 2d at 678.

Considering the affidavit offered here in light of this interpretation of the particularity requirements of Rule 9(b), we find that it alleges the *time* the alleged fraud was committed — 10 August 1978, when plaintiff-wife expected to re-enter the hospital for medical procedures necessitated by the 9 September 1977 accident. It alleges the *place* — her home in Massachusetts. It alleges the *content* of the alleged fraudulent representation — that her dealings with Allstate would not affect any suit by plaintiff-wife against the other party involved in the accident. Finally, it alleges *what was obtained as a result* — plaintiff-wife's signature on a document which purported to release "[plaintiff-husband] and any other person, firm or corporation charged or chargeable with responsibility or liability" arising out of the 9 September 1977 accident. We thus find that, as to the question of fraud, the contents of the affidavit satisfy the requirements of Rule 9(b) as interpreted by our Supreme Court in *Terry*. We hold that the contents of the affidavit also sufficiently raised an issue of fraud in the execution of the release and that the affidavit should have been admitted pursuant to the rule which permits introduction of extrinsic evidence tending to show that execution of a written agreement was procured by fraud.

We noted above that, just as a release is subject to avoidance by a showing that its execution resulted from fraud, it is likewise subject to avoidance by a showing that its execution resulted from mutual mistake of fact. *See Cheek v. R.R.*, 214 N.C. 152, 198 S.E. 626 (1938). Thus, although in her brief plaintiff-wife seeks to avoid operation of the release on the theory of fraud alone, such avoidance also can be attained if the facts presented in the affidavit raise an issue as to whether the release was executed pursuant to a mutual mistake of fact.

The Tennessee Court of Appeals, in a case factually similar to the case at bar, has considered the effect of mutual mistake by parties to a release on the liability of unnamed joint tortfeasors who did not provide consideration for the release. *Evans v. Tillet Brothers Construction Company*, 545 S.W. 2d 8 (Tenn. App.), *cert. denied*, (Tenn. 1976). In *Evans* the plaintiff sued a

Cunningham v. Brown

construction company and a bridge company for negligent construction of a highway which allegedly caused the death of his minor daughter. The defendants filed a third-party complaint against the driver of the car in which plaintiff's decedent was a passenger at the time of her death. The driver pleaded a release executed by plaintiff and delivered to him as a bar to the third-party claim, and the court dismissed the claim against him. Thereafter defendants moved for summary judgment and pleaded the release as a bar to plaintiff's claim against them. The document stated that it released the driver, and "all other persons, firms or corporation[s]." *Evans*, 545 S.W. 2d at 10. The court reversed entry of summary judgment for the defendant, stating:

We believe that the affidavits submitted in support of the motion created a material issue of fact with regard to the intention of the parties in releasing an unnamed tortfeasor, and while it may be determined from the trial of this issue that the weight of the evidence compels the conclusion that the language of the release instrument must prevail or that it is consistent with the intention of the parties, the existence of this genuine issue of fact precludes a determination of the matter upon the record in support of the motion.

. . . .

Therefore, we hold that a genuine issue of fact exists regarding the scope of the release in question and that the Court was in error in sustaining the motion for summary judgment and dismissing the action.

Evans, 545 S.W. 2d at 12.

We find the rationale of the Tennessee Court of Appeals in *Evans* persuasive in considering the facts presented here. The facts alleged in plaintiff-wife's affidavit would permit a finding that she and the adjuster agreed and intended to release only plaintiff-husband. The document signed contained language contrary to this mutual agreement and intention in that by its terms it released other joint tortfeasors as well as plaintiff-husband. It therefore failed to achieve the result which could be found to have been agreed to and intended by both parties. The failure to accomplish the result intended by both parties is not "[a] bare mistake of law [which] generally affords no grounds

Cunningham v. Brown

for reformation," but is "a mistake of fact which will afford reformation." *Durham v. Creech*, 32 N.C. App. 55, 60, 231 S.E. 2d 163, 167 (1977). Thus the failure to accomplish the result intended by both parties here could be found to constitute a mutual mistake of fact which would permit reformation of the document.³

We conclude that the affidavit offered by plaintiff-wife in avoidance of defendant's motion for summary judgment was admissible pursuant to the above cited authorities which permit the introduction of parol evidence tending to show that execution of a written agreement was procured under circumstances amounting to fraud or mutual mistake. The trial court therefore erred in sustaining defendant's objection lodged on the basis of the parol evidence rule.

Because exclusion of the affidavit was error, it follows that the granting of defendant's motion for summary judgment was also error. It is elementary that summary judgment is proper only when the pleadings and affidavits demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Cone v. Cone*, 50 N.C. App. 343, 274 S.E. 2d 341 (1981). Plaintiff-wife's affidavit, which we hold here should have been allowed into evidence, raised genuine issues of fact as to whether the release in question was executed under circumstances amounting to fraud or mutual mistake. See *Durham v. Creech*, 32 N.C. App. 55, 231 S.E. 2d 163 (1977) and *Evans v. Tillett Brothers Construction Company*, 545 S.W. 2d 8 (Tenn. App.), cert. denied, (Tenn. 1976) discussed hereinabove. Because these genuine issues of fact were raised, entry of summary judgment dismissing plaintiff-wife's claim was error.

The trial court's order granting defendant's motion for summary judgment and dismissing plaintiff-wife's claim is re-

³Cf. *Wyatt v. Imes*, 36 N.C. App. 380, 244 S.E. 2d 207, review denied, 295 N.C. 557, 248 S.E. 2d 735 (1978) and *Beeson v. Moore*, 31 N.C. App. 507, 229 S.E. 2d 703 (1976), review denied, 291 N.C. 710, 232 S.E. 2d 203 (1977) (wherein this court recognized that releases may be avoided for mutual mistake but found that the plaintiffs had not offered any forecast of evidence tending to establish mutual mistake).

High Rock Lake Assoc. v. Environmental Management Comm.

versed, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HEDRICK and CLARK concur.

HIGH ROCK LAKE ASSOCIATION INC., AND MARY DAVIS v. NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, AND H.W. WHITLEY, CHAIRMAN OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

No. 8010SC722

(Filed 7 April 1981)

Waters and Watercourses § 3; Administrative Law § 4— river basin not declared capacity use area – no arbitrary or capricious action

The Environmental Management Commission did not act arbitrarily or capriciously in deciding not to declare the Yadkin River Basin a capacity use area.

APPEAL by petitioners from *Herring, Judge*. Order entered 28 April 1980, in Superior Court, WAKE County. Heard in the Court of Appeals 11 February 1981.

This case is a direct outgrowth of the plans of Duke Power Company (hereinafter Duke), not a party to the suit, to construct and operate a nuclear power station, known as the Perkins Plant, on the Yadkin River in Davie County. Plaintiffs are an association of riparian property owners on High Rock Lake, which is downstream from the proposed plant, and an individual riparian landowner on the Yadkin River. Defendant, the Environmental Management Commission of the North Carolina Department of Natural Resources and Community Development, formerly the Department of Natural and Economic Resources (both hereinafter referred to as the Department), is charged with the responsibility of applying the Water Use Act of 1967, G.S. 143-215.11 *et seq.*

In its plans to construct the Perkins Plant, Duke proposes to withdraw from the Yadkin River up to 72,000,000 gallons of water per day, or 112 cubic feet of water per second (cfs), to be

High Rock Lake Assoc. v. Environmental Management Comm.

used primarily in the operation of a closed cycle cooling system. Public concern over the environmental effects of Duke's proposed water use caused the Environmental Management Commission (hereinafter Commission) to direct the Department to study the proposed use and make a recommendation as to whether all or part of the Yadkin River Basin should be declared a capacity use area pursuant to G.S. 143-215.13. In July 1976, the Department submitted a report recommending that the Commission not declare the basin a capacity use area.

Nevertheless, the Commission, after a public meeting in September 1976, decided to hold two public hearings on the question of declaring the Yadkin River Basin a capacity use area. After the hearings, the Commission adopted Resolution 76-41 in which it found that, although the proposed plant would affect the quantity and quality of downstream water, imposition of conditions for withdrawing the water would be sufficient to protect downstream users. Resolution 76-41 contained a list of conditions which will be reviewed in the opinion.

After the adoption of Resolution No. 76-41, plaintiffs sought judicial review in Superior Court, Wake County. The trial court's dismissal of plaintiffs' complaint for lack of jurisdiction was affirmed on other grounds by this Court in *High Rock Lake Association v. Environmental Management Commission*, 39 N.C. App. 699, 252 S.E. 2d 109 (1979). In the opinion written by Morris, Chief Judge, the Court noted that the Commission's action, which the Court found to be part of the Commission's rule-making function, was properly reviewable by procedures outlined in the Administrative Procedure Act, G.S. 150A-1 *et seq.*, i.e., by first seeking a declaratory ruling pursuant to G.S. 150A-17 and thereafter presenting the matter for review pursuant to G.S. 150A-43.

In April 1979, under G.S. 150A-17, plaintiffs requested a declaratory ruling as to the validity of Resolution No. 76-41 and as to the applicability of the Water Use Act of 1967. In Declaratory Ruling No. 79-1, dated 14 June 1979, the Commission determined that Resolution 76-41 was valid and that it constituted the Commission's determination regarding the Applicability of the Water Use Act to the Yadkin River Basin. Thereafter, pursuant to G.S. 150A-17 and G.S. 150A-43, plaintiffs sought judicial review in Superior Court of Wake County. On 28 April 1980,

High Rock Lake Assoc. v. Environmental Management Comm.

the court affirmed Declaratory Ruling No. 79-1, finding that none of the six grounds for reversal under G.S. 150A-51 existed. From that order, plaintiffs have appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Pfefferkorn and Cooley, P.A., by Robert M. Elliot, for plaintiff appellants.

ARNOLD, Judge.

A declaratory ruling by an administrative agency is subject to judicial review as though it were an agency final decision or order in a contested case. G.S. 150A-17. Article 4 of Chapter 150A defines the judicial review process, and, within that Article, G.S. 150A-51 establishes the scope of review as follows:

Scope of review; power of court in disposing of case. — The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

In the case before us, plaintiffs' only argument is that the superior court erred in affirming the declaratory ruling of the Commission and in failing to find the Commission's ruling arbi-

High Rock Lake Assoc. v. Environmental Management Comm.

trary and capricious. Plaintiffs contend that the evidence before the Commission showed a grave threat to water quantity and quality in the Yadkin River and High Rock Lake area, and that this threat *required* the Commission to designate the area a capacity use area pursuant to G.S. 143-215.13.

It is important to note at the outset that, under G.S. 143-215.13, the Commission's determination of capacity use areas is discretionary. G.S. 143-215.13 reads in pertinent part:

(a) The Environmental Management Commission *may* declare and delineate from time to time, and *may* modify, capacity use areas of the State where it finds that the use of groundwater or surface water or both require coordination and limited regulation for protection of the interests and rights of residents or property owners of such areas or of the public interest. [Emphasis added.]*

The question raised by plaintiffs and addressed by this Court is whether the Commission acted arbitrarily or capriciously in

*The proper scope of judicial review for the Commission's determination that a given area should or should not be declared a capacity use area would appear to be whether the Commission has abused its discretion. We note that, under G.S. 150A-51, this scope of review is not enumerated. In this regard, North Carolina's definition of scope of review differs from the Federal Administrative Procedure Act which specifically excludes judicial review of agency action which is discretionary. 5 U.S.C. § 701(a)(2). Under 5 U.S.C. § 706 (2) (A), however, the reviewing court is empowered to hold unlawful and set aside agency actions, findings, and conclusions which the court determines to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" This section leads at least one commentator to conclude that discretionary agency action is reviewable under the Federal Administrative Procedure Act. B. Schwartz, Administrative Law § 152 (1976).

Section 15(g)(6) of the Revised Model State Administrative Procedure Act, which does not specifically exclude judicial review of discretionary agency decisions, states that the reviewing court may reverse or modify agency decisions which are "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." The Comment on this section states that "'clearly unwarranted exercise of discretion' has been specifically equated to 'arbitrary action.'"

High Rock Lake Assoc. v. Environmental Management Comm.

making findings unsupported by substantial evidence in the record, G.S. 150A-51(5), and in thereafter concluding that the Yadkin River Basin need not be declared a capacity use area. In this review, we are guided by the standard of judicial review known as the "whole record" test. This test properly takes into account the specialized expertise of the staff of an administrative agency, and, thus, does not allow the reviewing court to substitute its own judgment for that of the Commission. It does require, however, that the court take into account evidence in the record which fairly detracts from the weight of the evidence the Commission relied upon to make its decision. *See Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977), in which the "whole evidence" test in the predecessor to G.S. 150A-51 was discussed.

After careful scrutiny of the record, this Court concludes that the trial court properly affirmed the decision of the Commission not to declare the Yadkin River Basin a capacity use area.

Under G.S. 143-215.13(b), a "capacity use area" is defined as one in which

the Environmental Management Commission finds that the aggregate uses of groundwater or surface water or both, in affecting said area (i) have developed or threaten to develop to a degree which requires coordination and regulation, or (ii) exceed or threaten to exceed, or otherwise threaten or impair, the renewal or replenishment of such waters. . . .

Although we have been unable to locate legislative history explaining why the North Carolina General Assembly chose to omit the "abuse of discretion" clause from its scope of review, we conclude that the North Carolina Act does not preclude judicial review of agency decisions which are discretionary. Our conclusion is based on the following: (1) the fact that the legislature did not specifically exclude such review; and (2) the way which the terms "arbitrary and capricious" and "abuse of discretion" are used interchangeably both in North Carolina and elsewhere. *See Welch v. Kearns*, 261 N.C. 171, 134 S.E. 2d 155 (1964); 2 Am. Jur. 2d, Administrative Law § 620.

High Rock Lake Assoc. v. Environmental Management Comm.

To our knowledge, the Commission has never adopted guidelines which would give clearer meaning to this broad statutory language.

At the hearings on the Yadkin River Basin, the following evidence was adduced. Duke's Perkins Plant has an estimated water consumptive use of up to 112 cfs. This water will be supplied from an impoundment or impoundments Duke will construct on a tributary or tributaries of the Yadkin River. Duke proposes to withdraw water from the Yadkin River to replenish the supply in the impoundment or impoundments.

According to a National Eutrophication Survey prepared by the Environmental Protection Agency, High Rock Lake is eutrophic; in 1973, when 16 North Carolina lakes were studied, it ranked last in overall trophic quality. In the investigation completed by the Department, the staff developed models which showed the effect of the proposed Perkins Plant. Under one set of assumptions, the staff found that the model indicated that, if Perkins were completed and ALCOA (which operates four hydroelectric generating facilities on the Yadkin River) attempted to generate the same amount of power as they did during some years in the past, the power pool of High Rock Lake would be completely drained. The study, however, noted that the assumptions on which the various models were developed were speculative, and the staff concluded that

In our opinion, the major impact will be on the loss of hydroelectric generating power and not on lake levels. In the future, the primary effect of reduction of streamflows in the High Rock Lake will create a loss of power, but not necessarily significantly affect lake levels. The most noticeable effects caused by the Perkins generating facility or any other future upstream water consuming project will be on the streamflows below the project and on the loss of power produced by ALCOA and CP&L.

In the Final Environmental Impact Statement prepared by the Nuclear Regulatory Commission, there was a statement that the average monthly loss of water as a percentage of upstream average river water flow at 100% load capacity would range from 2.6% in March to 6.2% in September; such reductions "may cause adverse impacts on some downstream users of Yadkin River water." The report continues:

High Rock Lake Assoc. v. Environmental Management Comm.

Only tentative plans for the withdrawal of water during periods of critical low flows have been set forth by the applicant. Negotiations are under way with the State of North Carolina to arrive at a definite minimum river flow at which proposed pumping rates will still be allowed. The applicant is presently proposing an impoundment on Carter Creek to supply sufficient supplemental storage of water to permit operation when flows drop below the eventual State-established maximum requirements. Until more definitive plans are presented, the staff will base its analysis on a flow of 880 cfs, a figure recently proposed by the applicant after discussion with State personnel. Under this mode of operating, pumping of water into the NSW Pond from the Yadkin River without compensating releases from Carter Creek Impoundment would only be permitted when river flows exceeded 880 cfs plus the amount being consumed by PNS [Perkins]. This means that when the plant is operating at the maximum consumptive use (112 cfs) and the flow in the river starts to drop below 992 cfs (880 + 112) as measured at the Yadkin College gauge, which lies between Carter Creek and the intake for PNS, the applicant must start to release water from Carter Creek in order to maintain the flow at 992 cfs at Yadkin College. This will maintain flow downstream of PNS at 880 cfs. If the river flow continues to decrease, the applicant must increase his release rate until it reaches 112 cfs (the consumptive use at PNS).

Plaintiffs point to the following portion of the impact statement:

The full pond storage volume of the lake is about 250,000 acre-ft. . . . The consumptive use of 112 cfs by PNS during the period from May 15 to September 15 would be equal to a total of about 27,100 acre-ft. . . . A loss of 27,100 acre-ft of water would lower the lake level about 2 ft below normal by September 15 if it is assumed that all other releases of water by the dam were the same as in the past. The only means available to mitigate this effect, besides reducing the consumptive loss of water by PNS, would be to correspondingly reduce the releases of water from High Rock Lake dam; however, the restrictions of the project's FPC operating license limit this option.

High Rock Lake Assoc. v. Environmental Management Comm.

The impacts of a 2-ft below normal reduction in summer lake level on High Rock Lake would be to: (1) decrease the area of the reservoir by about a maximum of 1000 acres by September 15, (2) decrease the desirability of the lake for swimming by increasing the exposure of mud flats and swimming hazards such as stumps and rocks, and (3) increase the boating hazards of the lake. High Rock Lake is an uncleared lake and is considered one of the most hazardous lakes in the High Rock chain. Any increased drawdown of the lake would be expected to increase this hazard.

The report continues, however:

Several factors must be considered to put the potential increased drawdown into perspective. A full 2-ft drop in lake level by September 15 would only occur if all three units of PNS were operating at 100% capacity throughout the summer. If less than three units were operating and/or if any of the units was [*Sic*] operating at less than 100% capacity, the resultant reduction in the lake level would be proportionally less. It should be reiterated that the full 2-ft drop below normal would only be reached by about September 15 and would be proportionally less earlier in the summer. . . . From this figure it can be ascertained that an additional 2-ft drop by September 15 would still keep the total drawdown to less than 5 ft during most of the summer. The Staff concludes that the lake level will probably drop to the 5 ft-below-full-pond level by September 15 nearly every year the station operates at full power throughout the summer.

In the summary on impacts on water use, the Nuclear Regulatory Commission concluded that the operation of Perkins Plant would cause (1) a minor decrease in water quality; (2) a slight reduction in the waste assimilative capacity of the Yadkin River; (3) probably no adverse reduction of water supply for downstream users, but increased difficulty maintaining desired lake levels in High Rock Lake during prolonged periods of below normal river flows; and (4) a decrease in the availability of water for hydroelectric power generation.

After reviewing this and other evidence, the Commission found that, among other things, "while Duke's proposed water use will affect downstream water quantity and quality, mea-

High Rock Lake Assoc. v. Environmental Management Comm.

asures short of declaring a capacity use area . . . can be taken to protect . . . downstream users. . . .” The Commission then concluded:

The North Carolina Environmental Management Commission (“The Commission”) has no objection to Duke’s withdrawal and consumptive use of water from the Yadkin River provided Duke strictly complies with the following conditions and that these conditions are made a part of any permit or license issued by the U.S. Nuclear Regulatory Commission pursuant to 42 U.S.C. 2131 et seq. and any certificate of necessity and convenience issued by the N.C. Public Utility Commission pursuant to N.C.G.S. 62-110 and 110.1.

(1) Duke will make no net withdrawals from Yadkin River when the streamflow is less than 1,000 cfs (645 MGD).

(2) Duke will limit net withdrawals from Yadkin River to not more than 25% of the total streamflow, or not more than that portion of this measured total streamflow that is in excess of 1,000 cfs, whichever is the lesser quantity (refer to Analysis of Yadkin River Flows with Perkins Power Plant Under Proposed DNER Withdrawal Restrictions included as Attachment A to this Resolution).

(3) Duke’s maximum daily consumptive use of water due to forced evaporation will not exceed 112 cfs (72 MGD).

(4) These conditions will be reviewed by the Environmental Management Commission at not less than 5 year intervals and will be subject to whatever modifications the Commission deems necessary to conserve and protect water resources in the public interest, including any modification that may arise from declaration of capacity use area pursuant to G.S. 143-215.11 et seq. and/or issuance of an order pursuant to N.C.G.S. 143-215.13(d).

(5) That Duke establish a suitable system for monitoring and reporting water withdrawals and water releases which is acceptable to the Director, Division of Environmental Management.

(6) That as a part of its findings, should it issue a Certificate of Convenience and Necessity, the Utilities Commis-

High Rock Lake Assoc. v. Environmental Management Comm.

sion find that the use of mechanical draft cooling towers is necessary to the construction and operation of the Perkins Plant, this stipulation is made solely in light of the Environmental Management Commission's concern for the quantity of water consumed by cooling towers and the fact that it presently appears to be law in the Fourth Circuit that the EPA cannot require cooling towers in lieu of cooling lakes and that cooling lakes evaporate significantly less water than do cooling towers.

Be it further resolved that the Commission hereby directs the Director, Division of Environmental Management, to initiate steps on behalf of the Commission, including intervening or participating in hearings of the NRC and PUC to insure that all of the conditions in Section B are included in the appropriate license or certificate, including a provision that the NRC and PUC license, certificate or permit is subject to future action by the Environmental Management Commission pursuant to N.C.G.S. 143-215.11 et al, and that in the event either agency fails for any reason to include all of these conditions in its license or certificate, the Director is instructed to so report to the Commission at its next meeting.

From the foregoing, it appears to this Court that the Commission did not act arbitrarily or capriciously in refusing to declare the Yadkin River Basin a capacity use area. Indeed, the record shows a high degree of concern about the effects of the Perkins Plant, and Resolution 76-14 reflects an effort on the part of the Commission to reduce those effects with action short of declaring the Basin a capacity use area. While there was evidence of the adverse effects of Perkins Plant, this Court, as the trial court, is not in a position to substitute its judgment for that of the Commission; we can only conclude that in view of the entire record the judgment of the Commission in this matter was supported by competent, material and substantial evidence, and was neither arbitrary nor capricious.

For the reasons stated above, the judgment of the trial court is

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

In re Plushbottom and Peabody

**IN THE MATTER OF THE APPEAL OF PLUSHBOTTOM AND PEABODY, LTD.
FROM THE ASSESSMENT OF CERTAIN OF ITS PROPERTY FOR TAXA-
TION BY THE MECKLENBURG COUNTY BOARD OF EQUALIZATION
AND REVIEW FOR TAX YEARS 1972 THROUGH 1977.**

No. 8026SC588

(Filed 7 April 1981)

**Taxation § 24.2—ad valorem taxation—situs of inventory outside N.C. for stitching
or laundering**

A foreign corporation which was a broker of high fashion jeans acquired a business situs in Mecklenburg County so as to subject its property (piece goods and finished goods) to ad valorem taxation by Mecklenburg County where its only warehouse for assembling and shipping its inventory was located in Mecklenburg County, and the tax situs of such property remained in Mecklenburg County while it was outside North Carolina on the tax date being stitched or laundered. G.S. 105-304(f)(4).

APPEAL by Mecklenburg County from *Ferrell, Judge*. Order signed 31 January 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 January 1981.

In 1977 the Mecklenburg County Tax Supervisor discovered and "listed" for tax purposes, certain piece goods and finished goods of Plushbottom and Peabody, Ltd. (Plushbottom) which had not been listed for taxes by Plushbottom for the tax years 1972 through 1977. Plushbottom operates on a fiscal year ending June 30, and all of its goods located in Mecklenburg County on June 30 of any particular year are listed for the following tax year. Plushbottom never listed for tax purposes any of its goods that were processed in Mecklenburg County if those goods were not physically present in Mecklenburg County on the tax date — June 30 of each year. The property which is the subject of the controversy is that property owned by Plushbottom which was outside of North Carolina for stitching or laundering on the tax date. The portion of Plushbottom's inventory which was out-of-state on the tax dates totalled \$271,170 for 1972, \$140,616.86 for 1973, \$190,267 for 1974, \$170,827 for 1975, \$623,360 for 1976, and \$620,324 for 1977.

Plushbottom appealed the "listing" to the Mecklenburg County Board of Equalization and Review, and the Board determined that the goods were subject to taxation in Mecklenburg County. Plushbottom then appealed to the North Carolina Property Tax Commission which sat as the State Board of

In re Plushbottom and Peabody

Equalization and Review. From an adverse decision by the North Carolina Property Tax Commission, Plushbottom filed its petition for judicial review under G.S. 150A-43, et seq., in the Superior Court of Mecklenburg County. The Superior Court reversed the decision of the North Carolina Property Tax Commission and ruled that the property did not have a tax *situs* in Mecklenburg County. The sole issue on appeal is whether that ruling by the Superior Court is correct.

Plushbottom is a foreign corporation incorporated in 1969 under the laws of the State of New York. Its headquarters is in New York City. Since 1971 Plushbottom has had a facility in Mecklenburg County and has listed and paid taxes on substantial property which was located in Mecklenburg County on the tax date. In 1973, Plushbottom obtained a Certificate of Authority to do business in North Carolina.

Plushbottom is a broker of wearing apparel — high fashion jeans — and not a manufacturer. Plushbottom's only warehouse and only place for assembling and shipping its inventory is in Mecklenburg County. Although all orders, scheduling, and sales are handled from the New York office, the sorting, delivering, tagging and invoicing are handled in the Mecklenburg County plant.

Plushbottom orders piece goods from various customers, and the piece goods are shipped to the Mecklenburg County facility for counting. These goods are then routed to various stitcheries in the Southeast (including places in North Carolina) for sewing. When the sewing is complete, the finished goods are returned to the Mecklenburg County facility. Prior to January 1975, the goods were then tagged, boxed, invoiced and shipped to customers. Since January 1975, Plushbottom has been delivering the finished goods to laundries in the Southeast (including places in North Carolina) for pre-washing. After the pre-washing, the finished goods are returned to the Mecklenburg County facility where they are tagged, boxed, invoiced and shipped to customers inside and outside the State of North Carolina. The cycle takes approximately six weeks from the time the piece goods enter Mecklenburg County until they leave Mecklenburg County as finished goods. The average stay of any particular item in Mecklenburg County is five days.

In re Plushbottom and Peabody

Plushbottom has 80 full-time employees in Mecklenburg County; its warehouse in Mecklenburg County contains 50,000 square feet. The New York facility contains 15,000 square feet and includes a showroom, a design room, a pattern-making room, a sales department and other executive offices. None of the property which Mecklenburg County has attempted to tax has ever passed through New York.

Ruff, Bond, Cobb, Wade & McNair, by Hamlin L. Wade, for appellant Mecklenburg County.

Bradley, Guthery, Turner & Curry, by Paul B. Guthery and Ray W. Bradley, Jr., for appellee Plushbottom & Peabody, Ltd.

BECTON, Judge.

Mecklenburg County's sole assignment of error raised two questions: Did the property of Plushbottom ever acquire a tax *situs* in Mecklenburg County? If so, did the property of Plushbottom lose its tax *situs* while it was being stitched or laundered outside of North Carolina? Because no constitutional issue has been raised about the right of North Carolina to tax the property under the Commerce Clause or the Due Process or Equal Protection Clauses of the United States Constitution, we turn to the applicable North Carolina Statute, G.S. 105-271, et seq.

The discovery, "assessment, listing and collection of ad valorem taxes on tangible personal property in North Carolina is regulated by" The Machinery Act, G.S. 105-271, et seq. *Transfer Corp. v. County of Davidson*, 276 N.C. 19, 24, 170 S.E. 2d 873, 877 (1969). G.S. 105-274 provides that all property — real and personal — within the jurisdiction of this state, whether owned by a foreign corporation or a domestic corporation, is subject to taxation unless specifically excluded or exempted from the tax base. G.S. 105-304 provides that tangible personal property subject to taxation shall be taxed at the residence of the owner, and "[t]he residence of a domestic or foreign taxpayer other than an individual person shall be the place at which its principal North Carolina place of business is located." G.S. 105-304(c)(2). Thus, the tax *situs* of a corporation's tangible personal property within the jurisdiction of the state is at the place of its principal office in North Carolina. *Transfer Corp., supra; In re Freight Carriers*, 263 N.C. 345, 139 S.E. 2d 633 (1965).

In re Plushbottom and Peabody

It is clear that Plushbottom has a business operation in the State of North Carolina. But, does the record contain facts to support a finding that Plushbottom has a "business *situs*" in North Carolina so as to subject its property to taxation by Mecklenburg County? In cases involving "intangibles" and "tangibles" the North Carolina Supreme Court answered "yes" to this question in 1936. In *Mecklenburg County v. Sterchi Bros. Stores*, 210 N.C. 79, 185 S.E. 454 (1936), the North Carolina Supreme Court considered the question of whether a foreign corporation having an office or store in Mecklenburg County was subject to an intangibles tax on its solvent credits arising from retail sales. The Supreme Court held that the credits (conditional sales contracts and accounts receivable) owned by Sterchi Brothers were subject to ad valorem taxation in Mecklenburg County and said:

As a general rule, the principal '*mobilia personam sequuntur*' governs the *situs* of tangible property for the purpose of taxation. In other words, movables follow the law of the person. There is a well recognized and just exception to this rule where there is a 'business *situs*' of intangibles separate and apart from the domicile of the owner. When the manner of doing business establishes this *situs*, the intangibles are taxable. . . .

. . . .

'The theory of taxation is, that the right to tax is derived from the protection afforded to the subject upon which it is imposed. . . . The actual *situs* and control of the property within this State, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here. . . .' (Citation omitted.)

. . . .

If the defendant was allowed to escape tax in this jurisdiction, under the facts and circumstances of this case, a foreign corporation, by establishing a 'business *situs*,' as in the present case, would have a special privilege over other installment stores of like nature located and doing business in Mecklenburg County, N.C.

210 N.C. at 83, 85, 87, 185 S.E. at 457, 458, 459-60. More importantly, the court in *Sterchi Bros.* adopted the following defini-

In re Plushbottom and Peabody

tion of business *situs* which is controlling: “Business *situs* — A *situs* acquired for tax purposes by one who has carried on a business in the state more or less permanent in its nature.” (Citation omitted.) *Id.* at 83, 185 S.E. at 457. Similarly, in *Texas Co. v. Elizabeth City*, 210 N.C. 454, 187 S.E. 551 (1936), the North Carolina Supreme Court held that motor boats owned by a non-resident corporation but which were used in and about Elizabeth City were subject to taxation in North Carolina. The court stated:

The *situs* of personal property for purposes of taxation is ordinarily the domicile of the owner. Where, however, the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the *situs* of said property for purposes of taxation is its actual *situs*, and not that of his domicile.

210 N.C. at 456, 185 S.E. at 522.

There is ample evidence in the record to support a finding that Plushbottom established a business *situs* by the conduct of its business so as to subject its property to taxation within the state. The entire inventory of Plushbottom is channeled through Mecklenburg County, and no portion of this inventory is ever shipped to or ever passes through New York.

The Mecklenburg County facility employs 80 people regularly and includes a building with 50,000 square feet. Seventy-percent of all Plushbottom's piece goods are obtained by Plushbottom from greige mills in North Carolina, and the piece goods are picked up from these mills at locations in North Carolina. Approximately fifty-percent of all laundering is done in North Carolina. Plushbottom officials admit settling in Mecklenburg County because it is a favorable area for trucking and business opportunities. In contrast, Plushbottom's headquarters, which is in New York, employs seventy people and is located in a building with 15,000 square feet.

Plushbottom contends that establishing a “business *situs*” is not enough, and that it is necessary to determine whether Plushbottom's inventory was “situated” or “more or less permanently located” in the state. In support of its contention, Plushbottom cites G.S. 105-304(d)(2), *In re Appeal of Finishing Co.*, 285 N.C. 598, 207 S.E. 2d 729 (1974), and *Transfer Corp.*,

In re Plushbottom and Peabody

supra, and seeks to distinguish *Sterchi Bros*, *supra*, and *Texas Co.*, *supra*.

Plushbottom reads the definition of “business *situs*” as set forth in *Sterchi Bros.* too broadly. A “*situs* [is] acquired for tax purposes by one [whose] . . . business in the state [is] more or less permanent in its nature.” 210 N.C. at 83, 185 S.E. at 457. *Sterchi Bros.* does not require that *inventory* be “more or less permanently located” in this state when a foreign corporation conducts business in this state on a more or less permanent basis. Moreover, when the Machinery Act is viewed in context, G.S. 105-304(d)(2) actually supports Mecklenburg County. The word “situated” (“more or less permanently located”) which is used in G.S. 105-304(d)(2) is not used in G.S. 105-274 which provides that foreign corporations are to be treated the same as domestic corporations. The word “situated” is also not contained in G.S. 105-304(c)(2) which provides that the residence of a foreign corporation shall be the place at which its principal North Carolina place of business is located. It is not necessary to look to the provisions of G.S. 105-304(d)(2) which provides that tangible personal property owned by a foreign taxpayer *which has not principal office in this state* shall be taxable at the place in the state at which the property is situated. (Emphasis added.) Plushbottom has a principal office in Mecklenburg County. Once Plushbottom established a business *situs* in this state, the tax *situs* for all its property became its principal place of business. G.S. 105-304(d)(2) contemplates a situation in which a corporation has no principal office in this state, and its property is in a transient condition through the state.

The *Finishing Co.* case, relied upon by Plushbottom, arose from an attempt by the tax supervisor of Forsyth County to tax a substantial portion of inventory which was located at the Hanes Mill in Forsyth County on the tax date. Hanes did not own the goods; rather, the goods belonged to 106 different customers from inside and outside the state of North Carolina. The goods remained at the Hanes plant for a period of three to six weeks before they were shipped back to the customers. Of the 106 customers, 102 were non-resident corporations. Only after finding that none of the 102 non-resident corporations had business premises in North Carolina, and only after further finding that the “business premises” of Hanes were not the business premises of the non-resident corporations, did the Court con-

In re Plushbottom and Peabody

strue G.S. 105-304(d)(2) to require that the inventory must be "situated" or "more or less permanently located" in the state in order for such inventory to be taxable in this state. 285 N.C. at 613, 207 S.E. 2d at 739.

Significantly, the *Finishing Co.* court also held that the inventory, owned by non-resident corporations but purchased from North Carolina greige mills and shipped to Hanes for processing and re-shipment to customers at destinations outside of North Carolina, was subject to ad valorem taxation by Forsyth County. *Id.* at 615, 207 S.E. 2d at 739. This holding in *Finishing Co.* with regard to purchases from North Carolina greige mills is instructive. There is evidence in this case that seventy percent of all piece goods owned by Plushbottom were picked up by Plushbottom from greige mills in North Carolina. Moreover, fifty percent of the laundering, all of which has been done since 1975, is done in North Carolina.

In *Transfer Corp.*, the taxpayer, a North Carolina corporation and therefore a domiciliary of North Carolina, was attempting to exempt from taxation in Davidson County a portion of its truck fleet that travelled in other states as a common carrier. Because the taxpayer in that case was unable to show that the trucks were either operated along fixed routes and on regular schedules into, through, and out of the non-domiciliary states or were habitually situated and employed in other states throughout the year, the court held that the entire fleet was taxable in Davidson County.

When the evidence is considered as a whole, it is apparent that the state of domicile continued at all times to afford all of plaintiff's property the opportunities, benefits, and protection which due process requires as a prerequisite of taxation. No protection, benefits, or opportunities were afforded by nondomiciliary jurisdictions throughout either of the tax years involved. Hence, all of the property was subject to ad valorem taxation in Davidson County.

276 N.C. at 35, 170 S.E. at 885. It is clear, then, that neither the taxpayer in *Transfer Co.* nor the taxpayer in *Finishing Co.* established a business premise or business *situs* in a nondomiciliary jurisdiction. A business *situs* in North Carolina, the nondomiciliary jurisdiction, has been established in this case.

In re Plushbottom and Peabody

Plushbottom further contends that the *Sterchi Bros.* case and the *Texas Co.* case are not controlling since the property in question in each of those cases was in, or used on a permanent basis in, North Carolina and was physically present in the state on the tax date. The distinction Plushbottom points out is one without a difference when we consider the definition of business *situs* in *Sterchi Bros.* The property in question (that property which was outside of Mecklenburg County on the tax date) is no different from the property which was in the Mecklenburg County warehouse on the tax date, insofar as determining the threshold question of whether Plushbottom had established a business *situs* in Mecklenburg County. Yet, Plushbottom has consistently listed with the tax supervisor's office in Mecklenburg County all of that property which is on hand in the warehouse on the tax date even though that property will be in Mecklenburg County for no longer than a week.

We, therefore, hold that Plushbottom acquired a business *situs* in Mecklenburg County so as to subject its property (piece goods and finished goods) to taxation within this state.

Did the property in question lose its *situs* for tax purposes while it was being stitched or laundered outside of Mecklenburg County? No. G.S. 105-304(f)(4) clearly provides that the temporary absence of tangible personal property from the place at which it is normally taxable shall not affect the rule of taxation. We see no difference between the property on hand on the tax date which Plushbottom readily admits should be taxed, and the property that is temporarily out of the county on the tax date. The following examples supplied by Mecklenburg County are illustrative:

Assume [a chain toy store] has its principal office in New York and has a store in Mecklenburg County. The store is stocked with inventory which has been purchased for resale. . . . A particular toy is placed on the shelf one day before the tax date and then is sold during the week following the tax date. It is obvious that this particular toy as well as all other inventory [whether sold the day before the tax date or not] is subject to taxation in Mecklenburg County even though the toy was not 'permanently located' in the County on the tax date. . . .

In re Plushbottom and Peabody

Assume a national company having its principal office in New York has a major sales outlet in Mecklenburg County with substantial assets in the county. Assume further it sells trucks . . . , and on the tax date one of the trucks is being serviced for repairs in York County, South Carolina . . . to be returned shortly thereafter for sale or lease. Assume further that the truck was purchased by and became a part of the inventory of the taxpayer only a few days prior to the tax date. Most certainly this property would have acquired a tax *situs* in Mecklenburg County and would not have lost that *situs* by virtue of its temporary absence from the county on the tax date.

These examples point out the important factors in this case — that Plushbottom owned and had title to the goods on the tax date, and the goods had been in Mecklenburg County on one, two, or three separate occasions prior to the tax date. These goods, like most other retail inventories, were being prepared for sale to customers and were not intended to be kept on hand for any extended period of time.

The *Finishing Co.* decision supports the conclusion we reach on this question too. In *Finishing Co.*, foreign corporations shipped goods to North Carolina for a finishing process but because those foreign corporations were found not to have established a “business premise” or “business *situs*” in North Carolina, the goods could not be taxed in North Carolina. Likewise, when Plushbottom’s property is shipped from Mecklenburg County to another state for a finishing process, the tax *situs* in Mecklenburg County is not interrupted. See also *Transfer Corp.*, *supra*, in which the court held that Davidson County did not lose tax *situs* on the trucks owned by Transfer Corp. which were moving from state to state.

If the property which is located in the warehouse on a tax date is subject to taxation, then the property which is temporarily out of the state on the tax date is likewise subject to taxation under the statute. The legislature has decreed that *all* property, real and personal, within the jurisdiction of the state, is subject to taxation whether owned by a resident or a non-resident. G.S. 105-274. The purpose of this strong decree is to treat all property owners equally so that the tax burden will be

State v. Daniels

shared proportionately, and to gather in all the tax money to which the various counties and municipalities are entitled. If Plushbottom were entitled to avoid this tax, it would be placed in a more favorable position than a domestic corporation which operates an identical type business.

The decision of the State Property Tax Commission was in all respects correct and should be sustained. The judgment of the Superior Court is

Reversed.

Chief Judge MORRIS and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. CLARENCE MELVIN DANIELS

No. 802SC456

(Filed 7 April 1981)

1. Criminal Law § 91—five months between service of criminal process and trial—no denial of speedy trial

Defendant was not denied his right to a speedy trial though 153 days elapsed between service of criminal process on him and commencement of trial, since the trial court entered an order of continuance on 11 September 1979 to “protect the interests of the defendant so that he would not be prejudiced by testimony heard during the companion case [of defendant’s accomplice]”; the court therefore excluded the time between 11 September 1979, the date on which the continuance was entered, and 15 October 1979, the date on which the next session of criminal court commenced in the county; and with this exclusion defendant was tried within 120 days as required by the Speedy Trial Act. G.S. 15A-701(b)(7).

2. Criminal Law §§ 58, 60.2—fingerprint cards—handwriting samples—admissibility

The trial court did not err in admitting fingerprint cards and handwriting samples obtained from defendant by an S.B.I. agent pursuant to an order issued by a district court judge in another county in another case, because nothing in the record indicated that the introduction of the exhibits in question resulted in placing before the jury evidence of separate, independent offenses committed by defendant; nor was there merit in defendant’s contention that the evidence should have been excluded by virtue of the State’s failure to comply with the statutory requirement that defendant or his attorney be provided a copy of the information as soon as it was available, because defendant’s attorney received the reports three and a half months

State v. Daniels

before trial commenced and defendant failed to show prejudice as a result of any delay in providing his attorney with copies of the reports. G.S. 15A-282.

3. Larceny § 4—felony charged in indictment—conviction of lesser offense proper

An indictment which charged defendant with the felony of 28 blank company checks was sufficient to sustain a conviction of misdemeanor larceny, although the indictment did not allege the value of the property stolen.

4. Criminal Law § 22—defendant not served with bill of indictment—arraignment waived—no prejudice

Where defendant waived arraignment, the proceeding designed to advise him of the charges against him, he could not sustain his burden of showing prejudice from insufficient notice resulting from the technicality of an incomplete officer's return on the bill of indictment.

APPEAL by defendant from *Small, Judge*. Judgment entered 19 December 1979 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 7 October 1980.

Defendant was charged in a bill of indictment, proper in form, with feloniously breaking and entering a building occupied by National Spinning Company, with the intent to commit the felony of larceny therein; with the felonious larceny therefrom of "28 blank company checks with three copies each"; and with feloniously receiving and possessing said checks. The State's evidence pertinent to the charges against defendant was as follows:

Patricia Chandler testified that she was employed by National Spinning Company in Washington, North Carolina, on 3 August 1978. Her duties included signing for checks which came into the data processing center. On 3 August 1978 she logged in some blank checks and placed them in a cabinet in the computer room. On 4 August 1978, when she took the checks out of the cabinet, she found that twenty-eight Chemical Bank checks and eleven Dyemaster, Incorporated checks were missing. She reported this to her immediate supervisor. After identifying several checks as having been among those which were missing, she indicated that when she had last seen the checks on 3 August 1978 they were blank. When she identified them at trial, they showed either Malcolm Goodwin or Goodwin Maintenance Service as the payee and were payable in varying amounts.

Carol Ann Edwards testified that she too was employed by National Spinning Company on 3 August 1978. She was on duty

State v. Daniels

that evening in the computer room where the blank checks were stored. She left this room on two occasions during the course of the evening, and on both occasions the room was unattended. On the first occasion she went to the guard house in response to a call, and while there she talked to one Patricia Harris for approximately fifteen minutes. She then returned to the computer room. On the second occasion she took a cart to the supply room in back of the plant, again in response to a phone call. She found that the person she thought had called was not on duty in the supply room. She was out of the computer room approximately fifteen minutes on this occasion.

Jerry Case testified that he was the corporate controller for National Spinning Company in August 1978. He identified the checks introduced as State's exhibits "as standard checks that National Spinning Company used in paying some of its bills." He testified that on the morning of 4 August 1978 Pat Chandler and her supervisor had advised him that some of the checks were missing. He also testified that both Patricia Harris and the defendant were former employees of the company.

Patricia Douglas Harris testified that she had worked in the computer room at National Spinning Company and thus was familiar with the check writing and printing procedures. On the night of 3 August 1978 she and the defendant went together to National Spinning Company's building to see Carol Edwards, her friend who worked in the computer room. She went to the company to "lure [Ms. Edwards] out of the computer room so that [defendant] would have access to the materials necessary for the operations that they had planned." The "plans were very simple . . . to get some checks and cash them." The checks were the property of National Spinning Company, "and she and [defendant] participated in the plan." Ms. Harris kept Ms. Edwards for fifteen or twenty minutes talking with her about Ms. Harris' need for assistance due to being "emotionally upset." Defendant stayed in the parking lot on this occasion, as they were unable to get inside the building.

She and defendant "did not want to let the plans drop," however, and they decided to return shortly before 11:00 p.m. when the shift changed. The gates are open at that time, "and you can go through them without any trouble." This time she and defendant "signed the log of some kind of name and pro-

State v. Daniels

ceeded into the . . . office area." They went to an office adjoining the computer area, where defendant called the operator on duty in the computer room and told her assistance was needed in the back of the plant. The operator left the computer room whereupon Ms. Harris and defendant went to the room and took some checks "from the middle of the stack . . . so they would not be noticed right away."

She and defendant then made plans "as to what amount of money to put on the checks [and] how soon to start busting them (cashing them)." She and defendant went to the Beaufort County Technical Institute where she typed the amount and other information on the checks. Defendant was with her while she did this. They agreed that "Cynthia Waverly" would be Ms. Harris' alias, and half the checks were made payable to "Cynthia Waverly." "Malcolm Goodwin" would be defendant's alias, and the other half were made payable to "Malcolm Goodwin" or "Goodwin's Maintenance Service." They each thereafter negotiated several of the checks.

The State also presented testimony from law enforcement officers who investigated the case.

Defendant's motion to dismiss at the close of the State's evidence was denied. Defendant offered evidence including his testimony denying that he had ever been on the premises in question in the company of Patricia Harris and that he had ever used the name "Malcolm Goodwin" or any other name as an alias. He further denied having the checks in question in his possession at any time. He testified that to his knowledge he had never touched the checks, and that he did not understand how his fingerprints (to which one of the law enforcement officers had testified) got on them.

Defendant's motion to dismiss at the close of the State's rebuttal evidence was granted as to the receiving and possession counts, but denied as to the breaking and entering and larceny counts. The jury returned a verdict of guilty of non-felonious larceny.

From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R.B. Matthis and Associate Attorney John F. Mad-drey, for the State.

State v. Daniels

Wilkinson and Vosburgh, by James R. Vosburgh, for defendant appellant.

WHICHARD, Judge.

We note at the outset that defendant's brief does not comply with North Carolina Rules of Appellate Procedure, Rule 28(b)(3), in that it does not state the questions presented separately with a reference following each question to the assignments of error and exceptions pertinent thereto. Nor does it comply with Appellate Rule 28(b)(4) which requires "[a] short conclusion stating the precise relief sought." We nevertheless consider the contentions presented pursuant to our inherent residual power expressed in Appellate Rule 2 to suspend the requirements of our rules "[t]o prevent manifest injustice to a party."

[1] Defendant contends that his rights to a speedy trial under the North Carolina Speedy Trial Act, G.S. 15A-701 *et seq.*, and the constitutions of the United States and the State of North Carolina have been violated. The record indicates that criminal process was served on defendant on 17 July 1979. The time limitations for trial imposed by the Speedy Trial Act commenced to run on that date. G.S. 15A-701(al)(1). Defendant was tried at a session which commenced on 17 December 1979. Thus, 153 days elapsed between service of criminal process and commencement of trial. Nothing else appearing, the court should have dismissed the charges against defendant for the State's failure to bring him to trial within 120 days of service of criminal process as required by G.S. 15A-701(al)(1). The trial court, however, excluded the time between 11 September 1979, the date on which an order was entered by Judge James Strickland continuing defendant's case, and 15 October 1979, the date on which the next session of criminal court in Beaufort County commenced. This period was excluded pursuant to G.S. 15A-701(b)(7) which in pertinent part provides for the exclusion of

[a]ny period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding.

State v. Daniels

G.S. 15A-701(b)(7) (Supp. 1979). The court made the requisite finding "that the ends of justice would be served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial." It also found that the "order of continuance . . . was to protect the interests of the defendant so that he would not be prejudiced by testimony heard during the companion case [of Patricia Harris], and the defendant has not been prejudiced by such delay as it was in his interest." These findings support the exclusion of the period between 11 September 1979 and 15 October 1979 from the Speedy Trial Act computation. With this exclusion, defendant was tried within 120 days as required by the Act. While defendant contends that the order of continuance was entered *ex parte* without affording him opportunity to be heard, nothing in the record supports his contention except his own allegations; and the order recites that the court "heard arguments of counsel." Further, we can ascertain no prejudice to defendant from the granting of the motion. On the contrary, it appears to have been for his benefit. We thus find no merit in the contention that defendant's rights under the North Carolina Speedy Trial Act were violated. Nor do we find merit in his contention that his constitutional rights to a speedy trial were violated. The time period between service of criminal process and commencement of trial was well within constitutionally permissible limits. See *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972); *State v. Moore*, 51 N.C. App. 103, 275 S.E. 2d 257 (1981), *State v. Hartman*, 49 N.C. App. 83, 270 S.E. 2d 609 (1980).

[2] Defendant contends that his constitutional rights have been violated by improper admission of evidence obtained from a non-testimonial identification in a prior case in another county. Specifically, he argues the court erred in admitting fingerprint cards and handwriting samples obtained from defendant by an S.B.I. agent on 22 February 1979 pursuant to an order issued by a district court judge in Wilson County in another case.

The introduction of fingerprint identification cards may be objectionable as violative of the rule prohibiting introduction of evidence showing that the accused has committed another separate, independent offense. It is not objectionable or prej-

State v. Daniels

udicial *per se*, however. See *State v. Jackson*, 284 N.C. 321, 331-334, 200 S.E. 2d 626, 632-634 (1973); *State v. McNeil*, 28 N.C. App. 347, 220 S.E. 2d 869, review denied 289 N.C. 618, 223 S.E. 2d 395 (1976). The admissibility of handwriting comparison evidence has been established in this jurisdiction by statute. G.S. 8-40. Nothing in this record indicates that the introduction of the exhibits in question resulted in placing before the jury evidence of separate, independent offenses committed by defendant. Nor do we find merit in defendant's contention that this evidence should have been excluded by virtue of the State's failure to comply with the statutory requirement that "the subject of nontestimonial identification procedures or his attorney must be provided with a copy of any reports of test results as soon as the reports are available." G.S. 15A-282. The trial court found that the reports were received by the S.B.I. on or about 26 March 1979; that between the date of defendant's arrest on 17 July 1979 and the date of his probable cause hearing on 29 August 1979, copies of the reports were given to the attorney representing defendant in the Wilson County case; and that on 4 September 1979 copies of the reports were given to his attorney in this case. It also found that any delay between receipt of the reports by the S.B.I. agent and furnishing the reports to defendant's attorneys did not result in prejudice to defendant. In view of the fact that defendant's attorney here received the reports on 4 September 1979, some 3½ months before trial commenced, we agree with the trial court's determination that defendant has failed to sustain his burden of showing prejudice as a result of any delay in providing his attorney with copies of these reports. G.S. 15A-1443.

[3] Defendant next contends the indictment fails to charge an offense. The gravamen of his argument appears to be as follows: The indictment is fatally defective in that it fails to allege the value of the property stolen. The jury acquitted defendant on the breaking and entering count. The larceny thus cannot be felonious on the ground that it was committed pursuant to a breaking and entering in violation of G.S. 14-54, as provided in G.S. 14-72(b)(2). Because the larceny was not committed pursuant to a breaking and entering, and because the value of the property stolen was not alleged, the indictment does not properly charge a felony and thus cannot properly charge the lesser included misdemeanor offense.

State v. Daniels

Defendant's brief contains no citation of authorities in support of this argument. Appellate Rule 28(b)(3). Nor do we find supporting authority for or merit to the contention. The indictment clearly and properly alleges the felony of larceny of twenty-eight blank company checks, the personal property of National Spinning Company. "[T]he misdemeanor of larceny is a less[er] degree of the felony of larceny within the meaning of G.S. 15-170." *State v. Cooper*, 256 N.C. 372, 380, 124 S.E. 2d 91, 97 (1962). This Court, speaking through Judge Clark, has stated: "It is established in the criminal law that the greater crime includes the lesser, so that where an offense is alleged in an indictment, and the jury acquits as to that one, it may convict of the lesser offense when the charge is inclusive of both offenses." *State v. Craig*, 35 N.C. App. 547, 549, 241 S.E. 2d 704, 705 (1978). Thus, the indictment alleging felonious larceny sufficed to sustain the conviction of misdemeanor larceny.

[4] Defendant further contends, with respect to the bill of indictment, that he was not served with a copy thereof and that "[t]his raises serious question as to whether or not the defendant actually had sufficient notice of the charges pending against him." He apparently relies on the incomplete Officer's Return on the "Notice of Return of Bill of Indictment." The record indicates, however, that on 23 August 1979 defendant waived arraignment and entered a plea of not guilty. "[T]he purpose of an arraignment is to advise the defendant of the crime with which he is charged." *State v. Carter*, 30 N.C. App. 59, 61, 226 S.E. 2d 179, 180 *review denied* 290 N.C. 664, 228 S.E. 2d 455 (1976). The defendant, having waived the proceeding designed to advise of the charges against him, cannot sustain his burden of showing prejudice from insufficient notice resulting from the technicality of an incomplete officer's return on the bill of indictment.

By a single sentence in his brief defendant attempts to bring forward numerous exceptions and assignments of error to the trial court's evidentiary rulings. It will suffice to say that we have examined the errors alleged, and we find that neither singly nor (as defendant contends) in their "accumulative effect" do the matters alleged establish error "so prejudicial as to amount to a denial of the defendant's rights to a fair trial."

Defendant contends the court erred in denying his motions

State v. Daniels

to dismiss at the close of the State's evidence and at the close of all the evidence.

Defendant introduced evidence, and by doing so waived his right to except on appeal to the denial of his motion for [dismissal] at the close of the State's evidence. G.S. 15-173. His exception to the denial of his motion for [dismissal] made at the close of all the evidence raises the question of the sufficiency of all the evidence to go to the jury.

State v. Rigsbee, 285 N.C. 708, 715, 208 S.E. 2d 656, 661 (1974). See also *State v. Jones*, 296 N.C. 75, 77, 248 S.E. 2d 858, 859 (1978). Without considering evidence which defendant contends should have been excluded, there was plenary evidence, when considered in the light most favorable to the State, "to establish each essential element of the offense charged and the defendant as the perpetrator thereof." *State v. Rogers*, 49 N.C. App. 337, 345, 271 S.E. 2d 535, 540 *review denied* 301 N.C. 530, 273 S.E. 2d 464 (1980). This contention is without merit.

Defendant finally contends that certain portions of the charge were erroneous and prejudicial. We have examined the portions complained of, and we find no prejudicial error.

Defendant's failure to comply with the Rules of Appellate Procedure considerably enhanced the difficulty of our task in reviewing the errors alleged. We nevertheless have examined carefully the contentions presented, both in the document captioned "Motion to Dismiss Pursuant to G.S. 15A-954" set forth at the commencement of defendant's brief, and in the brief itself. On the basis of this examination we deny the motion, and we find that defendant had a fair trial free from prejudicial error.

No error.

Judges CLARK and WEBB concur.

Overton v. Board of Education

PAUL OVERTON, JR. v. GOLDSBORO CITY BOARD OF EDUCATION

No. 808SC756

(Filed 7 April 1981)

Schools § 13.2—dismissal of career teacher—neglect of duty—indictment for felony—request for leave of absence—failure to teach classes

The superior court did not err in finding that the decision of defendant board of education to dismiss plaintiff career teacher on 10 May 1979 for neglect of duty because he failed to return to his classes after his indictment on felony drug charges on 24 April 1979 was unsupported by substantial evidence where the evidence showed that, prior to the period in question, plaintiff's performance as a teacher had consistently been rated as satisfactory; both the school superintendent and the school principal were in contact with plaintiff after his indictment; neither man asked or told plaintiff to return to work and neither advised plaintiff that his absence was being considered neglect of his contractual duties; both the superintendent and principal acquiesced in plaintiff's decision not to return to the classroom; plaintiff's continued absence was due to his concern for what was best for his students; and plaintiff made a written request for leave of absence without pay but defendant board never acted upon such request. G.S. 150A-51.

Judge HEDRICK dissenting.

APPEAL by defendant from *Peel, Judge*. Order entered 12 May 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 3 March 1981.

In April 1979, plaintiff, a career teacher with more than fifteen years' experience in the North Carolina public school system, was charged in a bill of indictment with felony drug charges. At the time of his indictment, plaintiff was employed by defendant as a physical education teacher at Middle School South. From the record, it appears that plaintiff first learned of his indictment through a radio news announcement on Tuesday morning, 24 April 1979. After calling his minister, plaintiff placed a telephone call to Bill Charlton, the principal of Middle School South, to tell him that he was in trouble and would not be at work that day and that, indeed, he did not know how long it would be before he would be able to return to work. Later that morning, Principal Charlton telephoned William Johnson, the Superintendent of the Goldsboro City Schools, and informed him of plaintiff's message. During the day, Johnson and the rest of the school community heard the news of the indictment against plaintiff.

Overton v. Board of Education

Plaintiff did not return to work later that week or, indeed, for the rest of the year. On 26 April, two days after plaintiff had learned of his indictment, plaintiff met with Superintendent Johnson to inform him of the charges against him, to profess his innocence, and to review the statute dealing with teacher dismissals.

On or about 3 May 1979, Superintendent Johnson called plaintiff to his office and requested his resignation effective no later than 8 May. Plaintiff refused, and by letter dated 8 May requested a leave of absence without pay. On 10 May, having received no resignation letter, Johnson officially recommended to defendant that plaintiff be suspended without pay and that appropriate dismissal procedures be initiated for neglect of duty. Defendant adopted a resolution suspending plaintiff without pay on grounds of neglect of duty. Superintendent Johnson notified plaintiff of this action by a 16 May letter. In that same letter, Johnson advised plaintiff that he was recommending plaintiff's dismissal on the grounds of neglect of duty and inadequate performance and that, under G.S. 115-142, plaintiff was entitled to a review before a five-member panel of the Professional Review Committee. Plaintiff requested a review, which was conducted on 5 July, at which the parties stipulated that the charge of inadequate performance had been dropped. After the hearing, the panel concluded that the charge of neglect of duty was "not true and substantiated."

Nevertheless, Superintendent Johnson recommended to defendant that plaintiff be dismissed as a teacher. On 10 December 1979, at plaintiff's request, defendant held a hearing concerning the Superintendent's recommendation. After hearing evidence from Johnson, Charlton, and plaintiff, the defendant issued a Report and Order finding that plaintiff had neglected his duties as a teacher and ordering that plaintiff be dismissed from employment.

From defendant's order, plaintiff appealed to the Wayne County Superior Court which considered the transcript of the hearing before the Board and concluded that the charges against plaintiff were not substantiated. From the court's order reversing its decision, defendant appeals.

Chambers, Stein, Ferguson & Becton, by James C. Fuller, Jr., for plaintiff appellee.

Overton v. Board of Education

Taylor, Warren, Kerr & Walker, by Lindsay C. Warren Jr. and Gordon C. Woodruff, for defendant appellant.

HILL, Judge.

In the court below, Judge Peel noted in his order that he had carefully reviewed the transcript of plaintiff's hearing before the Board, the Report of the panel of the Professional Review Committee, the court pleadings, and the arguments of counsel. Judge Peel stated:

Upon a full review of the whole record of the case, and having given independent consideration to the Report of the Professional Review Committee, the court is of the opinion, and so holds, that the charges brought by the Superintendent against the petitioner/appellant are not substantiated.

It is to this finding that defendant excepted and assigned error, arguing that the decision by the Board of Education was supported by substantial evidence and should have been upheld.

At the outset, we note that the trial judge's order did not track the language of G.S. 150A-51, the statute which requires the judge to set forth the reasons for reversing the Board's decision. We have, however, read his order to mean, in the applicable statutory language, that the decision by the Board of Education was unsupported by substantial evidence, G.S. 150A-51(5). Appellant has also read the order to state this. Our review of the trial court's action is limited, therefore, to the question of whether the trial court erred in finding that the Board's decision was not supported by substantial evidence.

This Court, having reviewed the whole record concerning plaintiff's alleged neglect of duty, agrees with the lower court and holds that the decision of the Board was not supported by substantial evidence and that plaintiff is entitled to reinstatement to his teaching position with the Goldsboro City Schools.

In reaching this result, we first review the proper role of the lower court in this case.

Plaintiff, in appealing to superior court for a review of defendant's decision to terminate his employment, was acting pursuant to G.S. 115-142(n). The applicable scope of judicial review of defendant's actions is set forth in G.S. 150A-51 which

Overton v. Board of Education

allows the lower court to reverse a school board decision if:

[t]he substantial rights of the petitioners [here the plaintiff] may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

* * *

(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted;

The predecessor statute to G.S. 150A-51, G.S. 143-315, was analyzed in a context analogous to the situation before us in the Supreme Court decision, *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). In *Thompson*, Justice Copeland wrote:

This standard of judicial review is known as the 'whole record' test and must be distinguished from both *de novo* review and the 'any competent evidence' standard of review. [Citations omitted.] The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo* ... [Citation omitted.]. On the other hand, the 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. [Citation omitted.]

Id. at 410, 233 S.E. 2d at 541.

In reviewing the whole record before us, it is important to note that the allegations plaintiff neglected his academic duties revolve solely around the events which occurred after 24 April 1979, the date plaintiff heard about the criminal charges against him. The record, which contained plaintiff's personnel file, showed that prior to the period in question, plaintiff's performance in every category had consistently been rated satis-

Overton v. Board of Education

factory, apparently the highest rating available on the "Principal's Evaluation of Teachers" form. In March 1972, his supervising principal found that he was doing a "commendable job" and that he was a "conscientious teacher." During the academic year 1972-1973, the same principal found his work "always satisfactory." Nothing in the record indicated a contrary evaluation until plaintiff encountered problems in the spring of 1979.

Superintendent Johnson's allegation concerning plaintiff's neglect of duty focused, therefore, on the issue of plaintiff's remaining away from school from 24 April 1979 until the Board's suspension of plaintiff without pay on 10 May 1979. The Board, in its 12 December 1979 order found as fact that neither the principal nor the superintendent gave plaintiff permission to absent himself from his teaching position or told him to stay at school. The Board further found that plaintiff's decision not to return to his teaching duties was voluntary and constituted neglect of duty.

In addition to being completely silent as to plaintiff's prior "commendable" performance, these findings of fact failed to give any weight to the following clear and uncontroverted evidence: During the period of time from 24 April to 10 May, both the Principal of Middle School South and Superintendent Johnson were in contact with the plaintiff. Neither of these two men asked or told plaintiff to return to work. Neither advised him that his absence was being considered neglect of his contractual duties. It appears that both men acquiesced in plaintiff's decision not to return to the classroom. Furthermore, both Principal Charlton and Superintendent Johnson admitted at the hearing that, although they may not have told plaintiff so, they agreed that it would be in the best interest of plaintiff's students that plaintiff not return to the classroom while charges were pending against him. The record also is clear that plaintiff's continued absence was due to his concern for what was best for his students.

There was also uncontroverted evidence that plaintiff requested leave without pay. From the record, it appears that defendant never responded to this request, but, instead, sought plaintiff's dismissal. In this regard, the case before us is clearly distinguishable from two cases cited by defendant. *Miller v.*

Overton v. Board of Education

Noe, 432 S.W. 2d 818 (Ky., 1968), and *Miller v. Board of Education of Jefferson County, Ky.*, 54 FRD 393 (1971), *aff'd. per curiam* 452 F. 2d 894 (Sixth Cir. 1971), both dealing with the same teacher dismissal. The *Miller* cases dealt with a teacher's taking a leave of absence despite the fact that he had requested, but had been denied, leave by the Board of Education. The courts held that this action constituted a vacation of the teacher's position and that the teacher was not entitled to reinstatement. In the case *sub judice*, there was no evidence that the Board denied plaintiff's request for leave or, indeed, that it ever acted on it.

The case of *Board of Education v. Mathews*, 149 Cal. App. 2d 265, 308 P. 2d 449 (1957), is also inapposite. The teacher in *Mathews* was dismissed because she failed on several occasions to return to the classroom *after having been ordered to do so*. Plaintiff, in this case, was never told to return to the classroom. Furthermore, Superintendent Johnson testified that it was normal practice to give an employee an opportunity to correct a situation before seeking a dismissal. Plaintiff never had that opportunity.

While we agree with defendant that the report of the panel of the Professional Review Committee should not have been solely determinative of the issue of plaintiff's neglect, we find that the record before us supports its conclusion that:

Mr. Overton made good faith efforts to communicate with his superintendent and principal and to cooperate with them. He was not told that he should return to the classroom under these circumstances. A reasonable man could assume that his continued absence was approved until he was instructed otherwise.

In reviewing the facts of this case, this Court has been acutely aware of the problems presented to a local school board by the events surrounding plaintiff's indictment. It is, at best, a difficult situation for school officials, teachers, and students. It would appear, however, that plaintiff's action in requesting a leave of absence until he could be cleared of criminal charges was the most prudent course of action. In light of all the evidence concerning plaintiff's general performance and, more particularly, concerning his performance from 24 April to 10 May 1979, this Court finds that defendant's decision to dismiss plaintiff was not supported by substantial evidence.

Overton v. Board of Education

The decision of the lower court is, therefore,
Affirmed.

Judge WEBB concurs.

Judge HEDRICK dissents.

HEDRICK, Judge dissenting:

I disagree with the majority that Judge Peel's statement that "the charges brought by the Superintendent against the petitioner/appellant are not substantiated" is the same as the "decision of the Board of Education is unsupported by substantial evidence. . . ." G.S. § 150A-51 requires the reviewing court, if it reverses the decision of the Board, to set down in writing its reasons therefor. My reading of that portion of the opinion in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977), quoted by the majority is that if, upon review, the "whole record" presents reasonably conflicting views, and the Board's decision represents one of those views, it is the duty of the reviewing court to affirm. Otherwise, the reviewing court would merely be substituting its own decision for that of the Board. In my opinion, Judge Peel merely substituted his own decision for that of the Board when he stated that "the charges brought by the Superintendent against the petitioner/appellant are not substantiated." If Judge Peel, after reviewing the "whole record," had concluded that the Board's decision was unsupported by substantial evidence and reversed, the Board would be informed wherein and how it erred, and we could study the "whole record" and determine whether the reviewing court erred. In essence, Judge Peel conducted a *de novo* hearing from the record and made *his own* decision based upon the evidence in that record, and the majority has reviewed Judge Peel's *de novo* decision and affirmed.

I vote to vacate the order from which the appeal was taken to this Court, and to remand the case to the superior court for a review of the whole record to determine whether that record presents reasonably conflicting views and whether the decision of the Board represents one of those views, and if it does, affirm, but if it does not, reverse and set down in writing wherein the Board erred within the parameters of G.S. § 150A-51.

Coley v. Eudy

LARRY W. COLEY AND JUDY B. COLEY, HIS WIFE v. CURTIS R. EUDY,
SR. AND ELIZABETH W. EUDY, HIS WIFE

No. 8019SC658

(Filed 7 April 1981)

1. Contracts § 29.2—breach of contract to assume mortgages – measure of damages

In an action for breach of a contract in which defendants agreed to accept plaintiffs' Rowan County home as a trade-in on a newly constructed home in Concord and to assume two mortgages on plaintiffs' Rowan County home wherein the evidence showed that defendants failed to assume the mortgages, that plaintiffs abandoned the Concord home and stopped making mortgage payments thereon, and that a mortgage on the Concord home was foreclosed, the trial court erred in instructing the jury that the measure of plaintiffs' damages was the difference between the purchase price and the fair market value of the Concord home at the time the contract was entered, since plaintiffs' actual damages were fixed by the amount of the deficiency after foreclosure of the mortgage plus other damages actually incurred by plaintiffs in their dealings with defendants, including plaintiffs' loss of equity in the Rowan County home and damages due to their payment of closing costs on the Concord home.

2. Contracts § 24—breach of contract – liability of feme defendant

The *feme* defendant was liable for damages for breach of a contract since she was a party to such contract.

APPEAL by defendant, Elizabeth W. Eudy, from *Seay, Judge*. Judgment entered 26 February 1980, in Superior Court, CABARUS County. Heard in the Court of Appeals 3 February 1981.

On 8 December 1977, plaintiffs filed a complaint against defendants Curtis R. Eudy and his wife Elizabeth W. Eudy as well as several financial lending institutions. Plaintiffs' suit against the various lending institutions was resolved either in Superior Court or in this Court, *Coley v. Bank*, 41 N.C. App. 121, 254 S.E. 2d 217 (1979), and is not the subject of this appeal.

In plaintiffs' complaint against the defendants Eudy, they set forth two causes of action. First, they alleged that the plaintiffs and defendants had entered into an agreement whereby plaintiffs were to purchase a newly constructed home of the defendants in Concord; as consideration, plaintiffs were to deed over their Rowan County home to defendants who agreed to assume two mortgages on the Rowan County home. Plaintiffs alleged that they did in fact deed the Rowan County home to

Coley v. Eudy

defendants who never intended to assume, and did not assume, the two mortgages. At the time the complaint was filed, plaintiffs had just been served with foreclosure papers on their Rowan County home. In the first cause of action, plaintiffs sought, *inter alia*, rescission of the contract to purchase the Concord home, restoration of their Rowan County home, and damages. As their second cause of action, plaintiffs alleged that defendants had expressly and impliedly warranted that the Concord home was constructed with good workmanship and good materials and that it was suitable for habitation. Further, plaintiffs alleged that the defendants breached their warranties in that the home had a faulty electrical system and that the basement of the home leaked, ruining the carpet and rendering the basement unfit for habitation. Plaintiffs sought damages for the breach of said warranties.

The *feme* defendant answered, denying plaintiffs' allegations and cross-claiming against her husband from whom she had obtained a legal separation. The *homme* defendant also answered admitting the contract between plaintiffs and defendants for the trade of the two houses and the assumption of the two loans by defendants. He also alleged that he had waterproofed the basement of plaintiffs' Concord home and installed storm windows for which plaintiffs never paid him. Plaintiffs' other allegations he denied.

At trial, which was held more than two years after the complaint was filed, the plaintiffs offered, through testimony of the *homme* plaintiff, the following evidence to which no objection was made. In February 1977, plaintiffs entered into a written Contract of Sale with defendants for the purchase of a newly constructed home in Concord. The contract price was \$58,700.00. Defendants agreed to accept in trade the plaintiffs' home in Rowan County at a price of \$37,500.00 and, further, to assume two mortgages totalling approximately \$32,000.00; the balance of approximately \$5,500.00 was to go to the plaintiffs. The Realtors Settlement Sheet, which was offered into evidence, showed that the actual balance of \$5,484.42 was applied against the purchase price and closing costs of the new home. Defendants also agreed in the Contract of Sale to "fix leaks in basement and put on storm windows and doors as agreed."

Plaintiffs moved into the Concord home in May 1977 and

Coley v. Eudy

immediately encountered problems with the heating system, the sewage drain, and water seepage on the north wall of the house. The electrical system malfunctioned causing spoilage of frozen food in plaintiffs' freezer. The water seepage continued and ruined the carpet in the basement as well as furniture in the basement.

Within three months after plaintiffs moved into the Concord house, they began receiving statements from Concord-Kannapolis Savings and Loan advising them that the loan on the Rowan County property was in default, that plaintiffs were responsible for the payments, and that, if plaintiffs didn't resume payments, the Savings and Loan would have to foreclose. In fact, the Savings and Loan did foreclose in September 1977.

After making six mortgage payments to North Carolina National Bank (NCNB), on the Concord house, plaintiffs determined that it was not fit to live in, and they ceased making payments. NCNB foreclosed and after foreclosure the Veterans' Administration, which had guaranteed the loan, sought from the plaintiffs the balance of plaintiffs' indebtedness, \$11,654.58, plus interest at four percent. The *homme* plaintiff testified that, in his opinion, the Concord house was worth about \$20,000.00.

After all the evidence, the trial court submitted, with instructions, two questions to the jury:

1. Did the defendants breach the contract made in the sale of the home to the plaintiffs?

Yes_____No_____.

2. What amount, if any, are plaintiffs entitled to recover of defendants? _____

From the jury's determination that there was a breach of contract and that damages amounted to \$40,000.00, the *feme* defendant appealed.

Wesley B. Grant, by Randell F. Hastings, for plaintiff appellees.

Hartsell, Hartsell and Mills, by Fletcher L. Hartsell, Jr., for defendant appellant.

ARNOLD, Judge.

Coley v. Eudy

The *feme* defendant presents two questions on this appeal. Her first argument is that the court's instructions to the jury were inaccurate, confusing and contrary to the law. For the reasons and to the extent set forth below, we agree.

[1] At the outset, we note that it appears from the record that the trial court's confusion in instructing the jury regarding plaintiffs' damages resulted from the several interrelated allegations contained in plaintiffs' complaint and from the fact that, since the complaint was filed, plaintiffs had significantly changed their position with regard to the Concord house. A comparative analysis of plaintiffs' complaint, and the evidence adduced at trial, reveals that plaintiffs' allegations as to defendants' fraud, misrepresentation, and breach of express and implied warranties were issues that were not raised by plaintiffs' evidence. This fact was correctly reflected by the issues which the trial court submitted to the jury. Defendant advances the argument that since plaintiffs' evidence did not conform to the allegations in their complaint, plaintiffs should have amended their complaint. We are unable to determine from plaintiffs' inartfully drawn complaint whether plaintiffs intended to allege simple breach of contract. That determination, however, is not essential. G.S. 1A-1, Rule 15(b) clearly states that a failure to amend pleadings to conform to the evidence does not affect the result of the trial of issues not raised by the pleadings. While we agree that it is the better practice to amend the pleadings so that they actually reflect the theory of recovery, *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972), failure to do so in the case before us is without real import.

In reviewing the instructions to the jury, however, we find that the trial court, while recognizing that plaintiffs' evidence supported only the breach of contract theory, defined the measure of damages in terms inconsistent with the evidence, and in a manner confusing to the jury.

Generally, a party who is injured by the breach of a contract is entitled to compensation for injuries sustained and is entitled to be placed, as near as possible, in the same position he would have occupied if the contract had been performed. *Fulcher v. Nelson*, 273 N.C. 221, 159 S.E. 2d 519 (1968). See also D. Dobbs, Handbook on the Law of Remedies, § 12.1, p. 786 (1973).

Coley v. Eudy

In breach of contract cases in which there is a failure by the contractor to construct a house in a workmanlike manner, according to plans and specifications, the damages to the non-breaching party may be measured in one of two ways: if the jury accepts evidence tending to show that the defects could readily be remedied without destruction of any part of the building, the measure of damages would be the cost of labor and materials to make the building conform to the contract; if, on the other hand, the jury accepts evidence showing that, to remedy the deficiencies, a substantial part of what had been done had to be undone, the measure of damages would be the difference in the value of the structure as contracted for and the value of the structure actually built. *Robbins v. C.W. Myers Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884 (1960); see also *D. Dobbs, supra*, § 12.21, p. 897. In the cases that have followed this method for computing damages, we can find no case in which damages were assessed in this manner where, as in the case at bar, the non-breaching party elected, in effect, to abandon the premises. See, e.g. *Patrick v. Mitchell*, 44 N.C. App. 357, 260 S.E. 2d 809 (1979). For the same principle of damages resulting from breach of warranty, see also *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974), and authorities cited therein. However, such damages under those circumstances may be patently inappropriate.

In the case at bar, the trial court stated:

In this matter the Parties Plaintiff, the Coleys, are entitled to the difference between the fair market price at the time the contract was entered into between the parties and when the parties realized that the contract had been breached, that is, the difference, the fair market value of the premises as compared to the initial purchase price as being the price set forth and fixed by the contract.

Under the facts of this case, these instructions, allowing plaintiffs to recover as damages the difference between plaintiffs' cost and the fair market value, were erroneous. The uncontroverted evidence shows that plaintiffs stopped making mortgage payments on the Concord home; NCNB foreclosed, and, after the foreclosure sale, plaintiffs found themselves indebted to VA for \$11,654.58. While the record does not necessarily reflect the exact amount obtained at the foreclosure sale, it would appear that plaintiffs' actual damages were fixed by the de-

Coley v. Eudy

ficiency after foreclosure, plus any other damages actually incurred by plaintiffs in their dealings with defendants. In this case there was ample evidence to support such damages.

The *homme* plaintiff testified concerning plaintiffs' loss of equity in the Rowan County home, the debt they owed to the Veterans Administration due to the Concord home foreclosure, and damages due to their payment of closing costs on the Concord home. Moreover, Plaintiffs' Exhibit No. 13 listed the foregoing alleged damages and revealed a total of \$19,631.84, less than one-half the damages awarded by the jury. We conclude, therefore, that, in awarding damages, the jury was misled by the instruction quoted above. We hold that the defendants are entitled to a new trial on the issue of damages.

[2] The *feme* defendant's second assignment of error, that the judgment as against her was unsupported by competent evidence, is without merit. While we agree with the *feme* defendant that there was no evidence to support the theory of implied and express warranties, we have noted above that the case eventually was tried on a breach of contract theory. The *feme* defendant was a party to the contract, and she is liable for damages caused by the breach of that contract.

For the reasons stated above, the *feme* defendant is entitled to a new trial on the issue of damages.

It is so ordered.

New trial.

Judges WELLS and HILL concur.

Smith v. Central Transport

DELORIS SMITH, WIDOW; CHARLES, CELIA ANN, ANNETTE AND HENRY SMITH, CHILDREN; HENRY DANIEL SMITH, DECEASED v. CENTRAL TRANSPORT AND LIBERTY MUTUAL INSURANCE COMPANY

No. 8010IC584

(Filed 7 April 1981)

1. Master and Servant § 49.1— worker's compensation – tractor-trailer driver as employee of carrier

The lessor-driver of tractor-trailer equipment, under a trip-lease agreement with an interstate commerce carrier, is deemed to be an employee of the carrier for worker's compensation purposes while operating the equipment under the carrier's ICC authority; therefore, deceased was an employee of defendant for worker's compensation purposes where he leased his tractor to defendant, defendant had exclusive possession, control and use of the tractor, its name was permanently affixed to the tractor, deceased was required to haul solely for defendant and was required to return defendant's trailer to its terminal within a reasonable time, defendant operated under an ICC franchise which extended to a purchaser in Maryland, where deceased had just made a delivery, defendant filed an Industrial Commission form listing defendant as the employer and indicating that deceased had been employed for eight years, and deceased had a trip-lease agreement with defendant.

2. Master and Servant § 63— worker's compensation – injury on highway – accident within course and scope of employment

Evidence was sufficient to support the finding and conclusion of the Industrial Commission that deceased's accident occurred in the course and scope of his employment, though the accident occurred approximately four and a half hours after deceased had delivered his load of chemicals and while he was still in the Washington, D.C. area heading in a direction which would have been opposite to the most direct route back to Wilmington, North Carolina, since it was abundantly clear from the record that defendant operated under an ICC franchise which extended to the customer to whom deceased had made his delivery; it was not unusual for defendant's drivers, including deceased, to wait from 8:30 a.m. until 2:00 p.m. before returning home since the drivers were instructed to call defendant's dispatcher before returning to see if defendant had anything for them to do coming back; defendant's drivers customarily rested, showered, and cleaned up before starting the return trip home; a truck stop located about two miles from the customer to whom deceased had made his delivery provided a restaurant, showers and a lounge for truck drivers; deceased did spend some time at the truck stop after making his delivery to the customer; deceased's truck had a sleeper in it; it was not unusual for truckers to turn around during trips; the bridge where the accident occurred was located between the customer to whom deceased made his delivery and defendant's office in Wilmington; and defendant owned the trailer pulled by deceased, and deceased was required to return the trailer to defendant in a reasonable time.

Smith v. Central Transport

3. Master and Servant § 58— worker's compensation – employee's death not caused by intoxication

The Industrial Commission did not err in finding and concluding that the accident in question was caused by a small pickup truck pulling in front of deceased, nor did it err in finding and concluding that deceased's death was not proximately caused by intoxication, since defendant completed an Industrial Commission form on the day of the accident stating that deceased lost control of his tractor-trailer when he "tried to prevent hitting a truck that had cut him off"; plaintiffs were not required to prove that deceased was not intoxicated; and although the Commission found as a fact that deceased had a blood alcohol content of between .14 and .16 per cent at the time of his death, the Commission found and concluded that death was not proximately caused by intoxication.

APPEAL by defendant, Central Transport, and defendant Liberty Mutual Insurance Company, from Order of the North Carolina Industrial Commission entered 20 December 1979. Heard in the Court of Appeals 27 January 1981.

Henry Daniel Smith (deceased) was killed in an accident while driving a large tractor-trailer rig near Washington, D.C. on 14 March 1978. After a full hearing, Chief Deputy Commissioner Forrest H. Shuford, II, found the death to be compensable and awarded compensation to the plaintiffs — the widow and children of the deceased. In an Order dated 19 December 1979, the North Carolina Industrial Commission (Commission) affirmed the opinion and award of Chief Deputy Commissioner Shuford. Defendants contend that no employer-employee relationship existed at the time of the accident; that deceased was not in the course and scope of his employment at the time of the accident; and that deceased's state of intoxication at the time of the accident precludes any award of compensation.

In December 1975, the deceased entered into a written contract with Central Transport, Inc. (Central) wherein deceased agreed to lease to Central his Peterbilt Tractor and to transport certain chemical materials for Central in Central's trailers or tanks. The deceased was to receive six percent of the revenue earned on materials which he delivered. The long term lease agreement provided:

The leased equipment under this agreement is in the exclusive possession, control and use of the authorized carrier LESSEE and . . . the LESSEE assumes full responsibility

Smith v. Central Transport

in respect to the equipment it is operating, to the public, the shippers, the Interstate Commerce Commission, and the Federal Highway Administration.

Central leased deceased's tractor on a full time basis and a condition of the lease was that deceased drive exclusively for Central. Central bought the license plate for deceased's tractor, and Central's emblem and name were permanently affixed to the side of deceased's tractor. Deceased was required to call Central's terminal to get instructions on deliveries, and Central's dispatcher directed deceased to various pick-up and delivery points under the ICC franchise authority of Central.

In accordance with their contract, Central's dispatcher assigned deceased to take a load of chemicals to Mineral Pigments Corporation (Mineral) in Beltsville, Maryland on 14 March 1978. Mineral is located just northeast of the District of Columbia. Deceased arrived at Mineral with the chemicals during the night of 13-14 March 1978 and went to sleep in the tractor. He was awakened by a maintenance man at Mineral at approximately 7:30 a.m., and the delivery was accomplished. Deceased left the premises of Mineral around 8:45 a.m. During the morning hours of 14 March 1978, after leaving Mineral, deceased stopped at Transittruck Center, a truck stop located about two miles from Mineral. There he purchased diesel fuel, a diesel fuel additive, a stomach antacid, and rubber tie down straps. The truck stop was equipped with restrooms and lounge facilities including shower baths for the truckers. It is unknown how long deceased remained at the truck stop.

At approximately 12:45 p.m. on 14 March 1978, deceased approached Cabin John Bridge which bridged the Potomac on I-495 northwest of the District of Columbia. Deceased was in his tractor-trailer unit heading in a northerly direction at a speed of 65 to 70 m.p.h. It was raining and the lights of the truck were burning. Deceased drove in the extreme left lane of the three northbound lanes on the northbound portion of the bridge. A small white pickup truck was also crossing the bridge at about the same speed as deceased was driving. There was evidence that this small white pickup truck pulled in front of deceased, who then suddenly turned his tractor-trailer sharply to the right. The tractor-trailer unit started skidding sideways down the bridge, came in contact with at least two other vehicles

Smith v. Central Transport

crossing the bridge, jackknifed and went over the side of the bridge. This caused fatal injuries to the deceased. Deceased had a blood alcoholic content of between .14 percent and .16 percent at the time of his death. The Commission found, however, that death was not proximately caused by intoxication and that the accident was one arising out of and in the course of employment.

The terminal manager for Central completed Industrial Commission Form 19 on 14 March 1978, the day of the accident, showing Central as the Employer and describing the accident in these words:

When driver tried to prevent hitting a truck that had cut him off, he lost control of his tractor-trailer and he hit the side of the bridge and went over the side into a sand bar.

This form was filed by defendant with the North Carolina Industrial Commission and was offered and received into evidence without objection.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by James G. Billings for defendant appellants.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, and Addison Hewlett, Jr. for plaintiff appellees.

BECTON, Judge.

[1] Defendant first argues that the Commission erred in finding as a fact and concluding as law that an employer-employee relationship existed. Appellate review of an award of the Industrial Commission is limited to reviewing (1) whether there was competent evidence before the Commission to support its findings; and (2) whether such findings support its legal conclusions. *Perry v. Furniture Company*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *McRae v. Wall*, 260 N.C. 576, 133 S.E. 2d 220 (1963).

The record contains ample evidence of the employer-employee relationship. By way of example, Industrial Commission Form 19 filed by the defendants lists Central as the employer and indicates that the deceased had been employed for eight years working an average of seventy hours per week with an average weekly wage of \$350.00. Furthermore, the terms of the contract and the course of conduct between Central and deceased clearly establish the following facts from which the

Smith v. Central Transport

Commission could have concluded that an employee-employer relationship existed: Central had exclusive possession, control and use of the tractor, and its name was permanently affixed to the tractor; the deceased was required to haul solely for Central and was required to return Central's trailer to Central's terminal within a reasonable time; Central operated under an ICC franchise that extended to Mineral in Beltsville, Maryland; deceased, as well as other drivers, was instructed to call Central's dispatcher before returning home to see if Central had anything for them to do on the return trip ("Normally, they would call about 6:00 o'clock p.m. in the evening to determine whether or not we had a trip for [them]. . . . [They would call] from the road or home or wherever they might be."); and Central advertised for trip-lease operators, listing as benefits, workman compensation coverage.

Moreover, the North Carolina Supreme Court has made an exception to the general rule that one who works according to his own judgment, without being subject to control except as to the result of his work, is an independent contractor, in cases involving trip leases under a lessee's ICC authority. Thus, it has been held that the lessor-driver, under a trip-lease agreement with an interstate commerce carrier, is deemed to be an employee of the carrier, for workman's compensation purposes, while operating the equipment under the carrier's ICC authority. *Watkins v. Murrow*, 253 N.C. 652, 118 S.E. 2d 5 (1961); *Suggs v. Truck Lines*, 253 N.C. 148, 116 S.E. 2d 359 (1960); *McGill v. Freight*, 245 N.C. 469, 96 S.E. 2d 267 (1957); *Roth v. McCord*, 232 N.C. 678, 62 S.E. 2d 64 (1950); *Brown v. Truck Lines*, 227 N.C. 299, 42 S.E. 2d 71 (1947). The deceased who was the lessor-driver in this case had a trip-lease agreement with Central, an interstate commerce carrier, and was an employee of Central for workman's compensation purposes.

[2] Having determined that the record contains facts sufficient to support the Commission's finding and conclusion that an employer-employee relationship existed, we turn now to Central's next contention — that the Commission erred in finding and concluding that deceased was in the course and scope of his employment at the time of the accident.

Our courts have held that an accident arises out of employment when it occurs while the employee is engaged in some

Smith v. Central Transport

activity or duty which he is authorized to undertake, and which is calculated to further, indirectly or directly, the employer's business. *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E. 2d 790 (1969); *Clark v. Burton Lines*, 272 N.C. 433, 158 S.E. 2d 493 (1968); *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 674 (1964). Our courts have never held that an employee has to be injured while transporting or unloading goods of his employer in order to receive compensation. Indeed, North Carolina has long held as compensable injuries sustained by employees (1) while on the way to or returning from work when the employer provides the means of transportation, *Perry v. Bakeries Co.*, *supra*; see also *Battle v. Electric Co.*, 15 N.C. App. 246, 189 S.E. 2d 788, *cert. denied*, 281 N.C. 755, 191 S.E. 2d 353 (1972); (2) while sleeping in hotels or eating in restaurants away from home, *Martin v. Georgia-Pacific Corp.*, *supra*; and (3) while awaiting another driver before returning home, *Clark v. Burton Lines*, *supra*.

It is true, as Central argues, that the accident in which deceased was killed occurred approximately four and a half hours after he had delivered his load of chemicals, and while he was still in the Washington, D.C. area heading in a direction which would have been opposite to the most direct route back to Wilmington, North Carolina. However, it is abundantly clear from the record (1) that Central operated under an ICC franchise which extended to Mineral Pigments; (2) that it was not unusual for Central's drivers, including deceased, to wait from 8:30 a.m. until 2:00 p.m. before returning home since the drivers were instructed to call Central's dispatcher before returning to see if Central "had anything for them to do coming back;" (3) that Central's drivers customarily rested, showered and cleaned up before starting the return trip home; (4) that Transitruck Center, which is about two miles from Mineral Pigments, provided a restaurant, showers and a lounge for truck drivers; (5) that deceased's truck had a sleeper in it; (6) that it was not unusual for truckers to turn around during trips; (7) that Cabin John Bridge, where the accident occurred, is between Mineral Pigments and Central's office in Wilmington; and (8) that Central owned the trailer pulled by the deceased, and deceased was required to return the trailer to Central in a reasonable time.

Employees whose work entails travel away from the employer's premises are held to be within the course of their em-

Smith v. Central Transport

ployment continuously during the trip except when a distinct departure on a personal errand is shown. *Martin v. Georgia-Pacific Corp.*, *supra*; *Clark v. Burton Lines*, *supra*; *Brewer v. Trucking Company*, 256 N.C. 175, 123 S.E. 2d 608 (1962); *Jackson v. Creamery*, 202 N.C. 196, 162 S.E. 359 (1932).

In *Martin v. Georgia-Pacific Corp.*, *supra*, Martin was attending a one-week training program in a distant city. After class, Martin left his hotel to look at some yachts and then proceeded to a steak house for dinner. An automobile veered into a safety island, resulting in Martin's death. The *Martin* court said:

Martin's death was by accident. The main question presented for decision by defendant's assignments of error is whether the evidence was sufficient to support the finding and conclusion that the injury by accident arose out of and in the course of employment. G.S. 97-2(6).

In 1 Larson, Workmen's Compensation Law, § 25.00, p. 443, it is said, "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable." . . . This seems to be the majority rule based upon an analysis of cases from various parts of the United States. . . .

We are of the opinion and so hold that while Martin was on his way to eat the evening meal, under the circumstances of this case, that he was at a place where he might reasonably be at such time and doing what he, as an employee, might reasonably be expected to do, and that in so doing he was acting in the course of and scope of his employment.

5 N.C. App. at 41-44, 167 S.E. 2d at 793-94.

Ordinarily, when an employee operates a vehicle in the course of his employment, an injury from the risks of the road arises out of and in the course of the employment. *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476 (1960); *Perkins v. Sprott*, 207 N.C. 462, 177 S.E. 404 (1934). In this case, the

Smith v. Central Transport

deceased was required to drive his tractor which he leased to Central, pull Central's trailer loaded with chemicals to Maryland, and then return the trailer within a reasonable time. Since his work entailed travel away from the employer's premises, and he was killed while driving for Central, the deceased is held "to be within the course of [his] employment continuously during the trip," 5 N.C. App. at 41, 167 S.E. 2d at 793, since a distinct departure on a personal errand was not shown. The Commission's finding and conclusion that deceased was in the course and scope of his employment at the time of the accident is without error.

[3] Defendants next argue that the Commission erred in finding and concluding that the accident was caused by a small white pickup truck pulling in front of deceased and further erred in finding and concluding that deceased's death was not proximately caused by intoxication.

The plaintiffs were not required to offer evidence as to the precise way in which the accident happened. *Battle v. Electric Co.*, *supra*. Consequently, it is not an essential finding that the accident occurred because of a white pickup truck. However, there is competent evidence in the record in support of the finding. Industrial Commission Form 19 completed by defendants and dated the very day of the accident, while not specifically mentioning *white pickup*, states that deceased lost control of his tractor-trailer when he "tried to prevent hitting a truck that had cut him off." This account, offered and received in evidence without objection, preceded any investigation by anyone representing the plaintiffs. Moreover, there was evidence from several witnesses who were deposed from which the Commission could have found that a white pickup was involved in the accident.

The plaintiffs were not required to prove that deceased was not intoxicated. G.S. 97-12 placed the burden of defense based upon intoxication upon the defendants to prove intoxication and to prove that death was proximately caused thereby.

Although the Commission found as a fact that deceased had a blood alcohol content of between .14 percent and .16 percent at the time of his death, the Commission found and concluded that death was not proximately caused by intoxication. This Court is bound by that finding. *Yates v. Hajoca Corp.*, 1 N.C. App. 553,

State v. Jacobs

162 S.E. 2d 119 (1968). *See also* *Inscoc v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977); *Lassiter v. Chapel Hill*, 15 N.C. App. 98, 189 S.E. 2d 769 (1972).

We have carefully reviewed defendants' other assignments of error concerning the finding of "borderline intoxication," the admission of hearsay testimony of the witness Dorsey and the Commissioner's abuse of discretion in denying defendants' motion to take further depositions. We find no prejudicial error in those assignments of error. The opinion and award of the North Carolina Industrial Commission is

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. FLOYD EUGENE JACOBS

No. 8017SC773

(Filed 7 April 1981)

1. Criminal Law § 29— mental capacity to stand trial – sufficiency of evidence

The trial court did not err in finding that defendant was mentally capable of standing trial where the only evidence before the court was a psychiatric report which concluded that defendant was mentally capable of standing trial, the psychiatric report noted that "the [defendant] has had a fluctuating mental status and at intervals he may not be viewed as being competent," and defendant presented no evidence that his mental status has fluctuated in any manner since the date of the psychiatric report.

2. Criminal Law § 29.1— capacity of defendant to stand trial — absence of hearing following second examination

Where a hearing was held after the first commitment of defendant to determine his mental capacity to stand trial, and defendant did not seek to introduce any new or additional evidence except for the psychiatric report following his second commitment for a determination of his capacity to stand trial, the trial judge's review of the second psychiatric report was sufficient compliance with the hearing requirement of G.S. 15A-1002(b)(2), and failure of the court to make findings and conclusions following his review of the second psychiatric report was not error.

3. Criminal Law § § 34.4, 46.1— evidence of other crimes – admissibility to show time frame, flight

In this prosecution for burglary, evidence elicited from defendant on cross-examination concerning his arrest for certain traffic violations shortly

State v. Jacobs

after the crime occurred, including speeding and failure to stop for a blue light and siren, was competent to establish the time frame in which the burglary took place and to show flight.

4. Burglary and Unlawful Breakings § 5— conviction of first degree burglary – motion to set aside verdict

The trial court properly denied defendant's motion to set aside a verdict of guilty of first degree burglary as being against the greater weight of the evidence where the State's evidence tended to show that the victim was awakened during the night and saw defendant, dressed in a dark sweatshirt and bluejeans, standing in the hall in front of her bedroom door; the victim called to her grandson upstairs, who yelled that he was coming down with a gun, at which time defendant left the house; the grandson found a green sweatshirt; police stopped defendant at a roadblock near the victim's home, at which time defendant had on bluejeans and no shirt; defendant stated that he was not in the victim's house; defendant testified he saw the victim standing in the hall in front of her bedroom door, but the State's evidence tended to show that the victim was confined to bed or a wheelchair at the time; and defendant testified that he went to the victim's home to talk to the victim's daughter about a job with a certain tobacco company, but the daughter testified that she did not know defendant and that she performed a job inconsistent with the job defendant suggested that she performed.

APPEAL by defendant from *Walker, Judge*. Judgment entered 2 April 1980 in Superior Court, STOKES County. Heard in the Court of Appeals on 23 January 1981.

Defendant was convicted of first degree burglary and sentenced to not less than ten nor more than fourteen years in prison.

On 22 October 1979 defendant was admitted to Dorothea Dix Hospital, pursuant to court order, for a determination of his competency to stand trial. In a discharge summary dated 6 November 1979, Dr. Billy Royal, the forensic psychiatrist who examined and evaluated defendant, set forth a psychiatric history that included prior diagnoses of schizophrenia and noted that the defendant's behavior was "somewhat inappropriate at times." Under the section of the discharge summary labelled "Psychiatric Evaluation and Opinions," Dr. Royal stated:

No thought disorder is noted. Memory appears to be adequate. Intellect is adequate. The patient is able to give adequate informational responses to the mental status questions. It is my impression that the patient is able to meet the minimal standards related to competency to proceed to trial.

State v. Jacobs

On 29 January 1980, after the defendant was discharged from Dorothea Dix and before his trial, defendant's attorney filed a motion alleging that since October 1979 defendant had failed to cooperate with his attorney, had called his attorney profane names, had threatened to kill his attorney, and had been seen talking to bugs and birds. Defendant's attorney requested a determination by the court that defendant was incapable of proceeding to trial. Based on the motion filed and the testimony of two witnesses who testified to irrational behavior by defendant, Judge Walker ordered defendant recommitted to Dorothea Dix for a determination of his capacity to proceed. Thus, defendant was again examined and evaluated by Dr. Royal.

In his second discharge summary, dated 12 February 1980, Dr. Royal made the following observations, among others: defendant has an IQ in the low 80's, which is consistent with low-normal intelligence; personality tests have indicated significant mental illness with patterns consistent with a schizophrenic process; defendant's functioning has improved over the previous hospitalizations; his ability to engage adequately in the interview situation is improved; he is able to respond to questions and his emotional response is appropriate for longer periods of time than heretofore noted; defendant is able to discuss his legal charges with consistency and appropriateness, and his judgment is poor but memory is adequate. Dr. Royal concluded as follows:

It is my opinion that in this setting the patient is able to meet the minimal standards related to competency to proceed to trial. It is noted that the patient has had a fluctuating mental status and at intervals he may not be viewed as being competent.

Defendant's case was called for trial at the 31 March 1980 regular criminal session of Stokes County Superior Court. After entering a plea of not guilty to the burglary charge, defendant renewed his motion to be declared incompetent to stand trial. This motion was based on the second discharge summary of Dr. Royal; no additional evidence was tendered. The court denied the motion, stating that it found defendant capable of standing trial at that time.

State v. Jacobs

The State's evidence tended to show that on the night of 29 September 1979 Annie Arnel Nelson, who lived in her home with her daughter and two grandchildren, was awakened by dogs barking outside her house; that when she looked around she saw defendant, dressed in a dark sweatshirt and bluejeans, standing in the hall in front of her bedroom door; that Mrs. Nelson, who was confined to bed or a wheelchair at the time, called to her grandson upstairs, who, himself, had been awakened by the dogs barking; that Mrs. Nelson's grandson heard footsteps downstairs and yelled that he was coming down with a gun, at which time defendant left the house; that Mrs. Nelson's grandson did not see defendant when he got downstairs, but he heard a car start up and come by the driveway; that he also found a green sweatshirt; that police had a road block set up near Mrs. Nelson's house in pursuit of a stolen car and stopped defendant at the roadblock at which time defendant had on bluejeans and no shirt; that Mrs. Nelson's grandson came down to the roadblock shortly after defendant was stopped, reported a burglary and identified the car being driven by defendant as the one he had heard outside his house; that Mrs. Nelson's house was locked when she went to bed, and she did not give defendant permission to enter her house; and that nothing was missing from her house after the incident.

Defendant testified that on the night in question he had gone to pick up his shirts at the home of one of Mrs. Nelson's neighbors; that when the neighbors failed to answer the door, he went to Mrs. Nelson's house to talk to her daughter, Frances Nelson, about a job with R.J. Reynolds' Tobacco Company; that he was wearing blue pants and a green shirt; that he did not go into Mrs. Nelson's house but stepped up on the back porch and opened the screen door, which was not locked; that he looked into the house and saw Mrs. Nelson standing there; that Mrs. Nelson saw him standing at the doorway, but she did not say anything; that he did not say anything to Mrs. Nelson because he did not know her; and that he wanted to get away because she was not the person he wanted to see.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for the State.

Stover, Dellinger & Browder, by James L. Dellinger, Jr. for defendant-appellant.

State v. Jacobs

BECTON, Judge.

[1] The defendant first contends that the trial court committed prejudicial error in concluding that he was mentally capable of standing trial. The defendant also contends that the trial court erred by failing to make specific findings of fact as to his capacity to stand trial.

At trial, defendant renewed his earlier motion, under G.S. 15A-1001, "concerning the competency of the defendant to stand trial." Defendant's renewed motion was based entirely upon the second discharge summary of the psychiatrist, Dr. Billy W. Royal, who opined that the defendant was "able to meet the minimum standards relating to competency to proceed at trial." We note that Dr. Royal's first discharge summary, dated 6 November 1979, also indicates that defendant was capable of standing trial. Moreover, Dr. Royal, in his second discharge summary, found that defendant had improved since the first admission and was "able to discuss his legal charges with consistency and basic appropriateness. . . ." While it is clear that Dr. Royal also noted "that the [defendant] has had a fluctuating mental status and at intervals he may not be viewed as being competent," it is equally clear that defendant presented no evidence at the time he renewed his motion suggesting that his mental status had fluctuated in any manner since the second discharge summary of 12 February 1980. Significantly, there was no allegation that defendant failed to cooperate with his attorney; there was no suggestion that defendant acted irrationally during the seven week period between the second discharge summary and the 31 March 1980 trial.

Defendant had the burden of persuasion on his G.S. 15A-1001 motion. *State v. Womble*, 44 N.C. App. 503, 505, 261 S.E. 2d 263, 265 (1980). Defendant failed to carry this burden. Indeed, defendant introduced no additional evidence at the time of his renewed motion except Dr. Royal's second medical report which clearly indicated that defendant was capable of standing trial. Consequently, the trial court did not err in denying defendant's motion and in concluding that defendant was capable of standing trial.

[2] On the facts of this case, it was not prejudicial error for the trial court to fail to make findings of fact and conclusions of law

State v. Jacobs

in denying defendant's motion. The language in *State v. Womble*, *supra*, bears repeating:

Better practice requires the trial court to make findings of fact in its order on a motion suggesting incapacity to proceed under G.S. 15A-1002. In the case *sub judice*, the court did not make findings of fact; however, such was harmless error inasmuch as the evidence presented would have compelled the trial court to find against defendant.

Id. at 505, 261 S.E. 2d at 265-66.

Under G.S. 15A-1002, of course, the court is required to hold a hearing to determine defendant's capacity to proceed. If an examination is ordered pursuant to G.S. 15A-1002(b)(2), the hearing is required to be held after the examination. Here, the record indicates that a hearing was held on 29 January 1980 after the first examination and discharge. No hearing was held following the second examination and discharge at the time the motion was renewed. However, defendant did not seek to introduce any new or additional evidence except for the psychiatric report. Under such circumstances, the right to a hearing has been held to be waived. *See, e.g., State v. Woods*, 293 N.C. 58, 64, 235 S.E. 2d 47, 50 (1977); *State v. Young*, 291 N.C. 562, 568, 231 S.E. 2d 577, 580-81 (1977); *State v. Potts*, 42 N.C. App. 357, 359, 256 S.E. 2d 497, 499 (1979); *State v. Williams*, 38 N.C. App. 183, 189, 247 S.E. 2d 620, 623 (1978). In this case there were no findings and conclusions for the court to make at a second hearing except to enumerate the findings in the second discharge summary. This the court was not required to do under *Womble*. Moreover, defendant did not object or except to the lack of a hearing at the time he renewed his motion or to the failure of the court to make findings of fact and conclusions of law. On the facts of this case, the trial judge's review of the second discharge summary — the only evidence before him — was sufficient compliance with the hearing requirement of G.S. 15A-1002(b)(2).

[3] In his next assignment of error, defendant contends that the trial court erred in allowing the State to cross examine him about pending criminal charges. Defendant's assignment of error was based on the portion of the cross examination that follows:

State v. Jacobs

I don't know what time I went to Mrs. Nelson's house. I was arrested at 10:30 p.m. for traffic violation.

MR. DELLINGER: Objection.

THE COURT: Overruled.

MR. BOWMAN: Were you arrested for failure to stop for a blue light and a siren?

A. Yes, sir.

MR. BOWMAN: Were you arrested for speeding to elude arrest?

A. I don't know if I was arrested for failing to pursue and all.

Q. You don't know about that?

A. No.

Q. Were you arrested for careless and reckless driving after drinking?

A. No.

Q. Were you arrested for no operator's license?

A. Yes, sir.

Q. And all these were after you left the Nelson house.

A. Yes, sir.

Q. Were you also arrested at this time for the larceny of a vehicle?

MR. DELLINGER: Objection.

THE COURT: Overruled.

A. No.

EXCEPTION NO. 2.

As can be seen, defendant testified without objection that he was arrested at 10:30 p.m. for traffic violations. The objection that followed his testimony on this point was lodged too late. Further, there is no exception at this point. Moreover, there are no objections, motions to strike, or exceptions noted to any of

State v. Jacobs

the next series of questions and answers concerning defendant's arrest for specific traffic violations.

While the State is not generally allowed to show evidence of a previous distinct, independent or separate offense, evidence of other offenses is admissible if it tends to prove any other relevant fact. If evidence of another offense tends to show anything other than the character of the accused or his disposition to commit an offense of the nature of the one charged, then that evidence is not inadmissible simply because it also shows the accused to have committed an independent crime. See, e.g., *State v. Barfield*, 298 N.C. 306, 328, 259 S.E. 2d 510, 528 (1979), *cert. denied*, 100 U.S. 3050 (1980); *State v. McQueen*, 295 N.C. 96, 123, 244 S.E. 2d 414, 430 (1978); *State v. Tate*, 294 N.C. 189, 196, 239 S.E. 2d 821, 826 (1978); *State v. Williams*, 292 N.C. 391, 396-97, 233 S.E. 2d 507, 510 (1977); *State v. Watson*, 287 N.C. 147, 160, 214 S.E. 2d 85, 93 (1975). In this case the evidence tended to prove other relevant facts. The traffic arrests were made as defendant was leaving the Nelson home and established the time frame in which the alleged burglary took place. Thus, they constitute part of the chain of circumstances surrounding the crime. Speeding and the failure to stop for a blue light and siren indicate an attempt to evade police officers and suggest "flight." Evidence of flight, together with all other facts and circumstances in the case, has long been recognized as admissible on the question of "consciousness of guilt." *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E. 2d 697, 698 (1973). See also *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972).

The last question in the portion of the cross examination set forth above concerns an arrest for larceny of a vehicle. Defendant objected and preserved his objection to that question. Even though the relevancy of an arrest for larceny of a vehicle is less tenuous on the facts of this case than the series of questions dealing with traffic violations, we find no prejudicial error in the trial court's decision to overrule the objection. Indeed, defendant's negative answer to the question seems to erase any prejudice that might arise from the asking of the question. This seems especially true when, as here, the defendant had just previously answered that he had been arrested for traffic offenses. Compare *State v. Brice*, 17 N.C. App. 189, 193 S.E. 2d 299 (1972), *cert. denied*, 283 N.C. 258, 195 S.E. 2d 690 (1973) (No prejudice resulted when defendant was asked about being pre-

State v. Jacobs

viously tried for another offense when his answer was unresponsive and he never admitted anything.), *with State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979) (No prejudice resulted in allowing the defendant to be questioned about an outstanding warrant when the defendant testified that he did not know of any such warrant and when other evidence amply established his guilt.).

[4] In his final assignment of error, the defendant contends that the trial court erred in denying his motion to set aside the verdict as being against the greater weight of the evidence. Defendant's evidence was squarely in conflict with the State's evidence. He stated that he was not in the house; the State's evidence showed that he was in the house. Defendant's evidence was that Mrs. Nelson was up and moving around; the State's evidence indicated that Mrs. Nelson was physically incapable of being up and moving around. Defendant's evidence was that he went to talk to Mrs. Lamb, with an implication that he knew her; Mrs. Lamb, testifying for the State, said she did not know defendant and further testified that she performed a job inconsistent with the job defendant suggested that she performed. Under these circumstances, the trial judge properly submitted the conflict in the evidence to the jury for it to resolve. *See State v. Alexander*, 18 N.C. App. 460, 197 S.E. 2d 272, *cert. denied*, 283 N.C. 666, 198 S.E. 2d 721, *cert. denied*, 284 N.C. 255, 200 S.E. 2d 655 (1973).

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the trial judge's discretion and is not reviewable on appeal, in the absence of evidence of abuse of discretion. *State v. McLean*, 294 N.C. 623, 633, 242 S.E. 2d 814, 820 (1978); *State v. Puckett*, 46 N.C. App. 719, 724, 266 S.E. 2d 48 (1980); *State v. Shufford*, 34 N.C. App. 115, 119, 237 S.E. 2d 481, 484 (1977), *cert. denied*, 293 N.C. 592, 239 S.E. 2d 265 (1977). In this case, the trial judge did not abuse his discretion and commit prejudicial error by denying defendant's motion to set aside the verdict as being against the greater weight of the evidence.

In this trial, we find

No Error.

Chief Judge MORRIS and Judge VAUGHN concur.

Hasty v. Carpenter

NELLIE HASTY, EXECUTRIX OF MARTHA B. TURNER, DECEASED v.
NANCY SHARON CARPENTER

No. 8011SC440

(Filed 7 April 1981)

Rules of Civil Procedure § 55— failure to file answer – entry of default proper

When defendant “specially appeared” 20 months after being served with a complaint and filed her motion to dismiss for lack of in personam jurisdiction and insufficiency of service of process, she was and had been for a considerable period in default for failure to answer within the time limits prescribed by G.S. 1A-1, Rule 12, and by this failure to answer, defendant admitted the averments of plaintiff’s complaint; therefore, where plaintiff’s motion for entry of default and an affidavit of one of plaintiff’s attorneys filed with the motion stated that defendant had been served with the complaint and had failed to answer or otherwise plead, the trial court was adequately informed of defendant’s failure to answer, entry of default was appropriate, and the trial court did not abuse its discretion in refusing to set aside entry of default.

APPEAL by defendant from *Hobgood (Robert H.)*, Judge. Judgment entered 18 February 1980 in Superior Court, HARNETT County. Heard in the Court of Appeals 4 November 1980.

Plaintiff instituted this action in her capacity as executrix of the estate of Martha B. Turner, deceased, seeking the setting aside of a deed from William W. Turner, Sr., who was the husband of plaintiff’s testate, to defendant, who is Turner’s daughter. Plaintiff alleged that her testate was murdered on 23 January 1974; that the murder was committed “at Turner’s instigation, hire and solicitation”; that on or about 20 August 1975 a deed was recorded in the Harnett County Registry whereby Turner made a voluntary conveyance to defendant “without consideration, without retaining sufficient property to pay his debts and the claims against him, to hinder, defeat, and delay the collection of plaintiff’s claim against said Turner [for the wrongful death of her testate].” She further alleged that the land conveyed was “substantially [Turner’s] sole asset.”

The action was commenced by the issuance of a summons and order extending time to file complaint on 30 October 1975. On 31 October 1975 plaintiff filed a Notice of Lis Pendens covering the land which was the subject of the deed in question. The complaint was filed 19 November 1975. Defendant was served by registered mail pursuant to the provisions of North Carolina

Hasty v. Carpenter

Rules of Civil Procedure, Rule 4(j). G.S. 1A-1. The summons and order extending time to file complaint were received by defendant on 6 November 1975. The summons and complaint were received by defendant's husband on 22 November 1975.

Defendant did not respond to plaintiff's complaint in any way until 29 July 1977, over twenty months subsequent to service of the summons and complaint. On 29 July 1977 counsel for defendant made a "special appearance" for the sole purpose of filing and arguing motions to dismiss the action and expunge from the record the Notice of Lis Pendens, on the ground of lack of jurisdiction over the person and property of defendant in that defendant had not been "legally served with process." This Court on a prior appeal in this case reversed a 4 October 1977 order granting defendant's motion and held that defendant was properly served with process. *Hasty v. Carpenter*, 40 N.C. App. 261, 252 S.E. 2d 274 *review denied* 297 N.C. 453, 256 S.E. 2d 806 (1979).

On 15 August 1977 plaintiff filed a motion for entry of default pursuant to North Carolina Rules of Civil Procedure, Rule 55. Subsequent to the filing of this Court's prior decision, defendant on 21 June 1979 filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure, Rule 12(b), for failure to state a claim upon which relief could be granted, and to cancel the Notice of Lis Pendens. On 5 September 1979 defendant filed a motion to dismiss plaintiff's motion for entry of default on the ground that defendant "had made some appearance," namely, a "special appearance by motion for dismissal"; and that defendant "had adequate and sufficient defenses to the alleged action of the plaintiff." She also moved for an order extending the time for filing answer on grounds that the failure to file "within the time prescribed . . . was due to excusable neglect" in that defendant did not have notice of the filing of the complaint and did file motions and responsive pleadings once she had such notice. A proposed answer was tendered as an exhibit attached to the motion.

On 14 September 1979 plaintiff moved to strike defendant's motions and the answer attached to the 5 September 1979 motion. On 1 October 1979 Judge Thomas H. Lee allowed plaintiff's motion for entry of default. The Order allowing the motion retained the case "for further hearing before entry of judg-

Hasty v. Carpenter

ment.” On 18 February 1980 Judge Robert H. Hobgood, after further hearing, entered judgment which declared the deed from Turner to defendant null and void, set aside and vacated the deed, and declared title to the land to be revested in Turner.

From this judgment, defendant appeals.

J.W. Hoyle, Kenneth R. Hoyle and Jimmy L. Love, for plaintiff appellee.

James F. Penny, Jr., for defendant appellant.

WHICHARD, Judge.

This court has held that defendant was served with summons and a complaint in this action, and thus that the trial court had personal jurisdiction over her. *Hasty v. Carpenter*, 40 N.C. App. 261, 252 S.E. 2d 274 review denied 297 N.C. 453, 256 S.E. 2d 806 (1979). The court in that appeal fixed 22 November 1975 as the date on which defendant was served with the complaint for the purpose of calculating the time within which defendant was required to file answer or other responsive pleading. North Carolina Rules of Civil Procedure, Rule 12(a)(1) requires that a defendant serve an answer “within 30 days after service of the summons and complaint upon him.” The record contains no timely motions for or orders granting an extension of time to file answer. Thus, when defendant on 29 July 1977 “specially appeared” and filed her motion to dismiss for lack of *in personam* jurisdiction and insufficiency of service of process she was and had been for a considerable period in default for failure to answer within the time limits prescribed by Rule 12.

By this failure to answer, defendant admitted the averments of plaintiff’s complaint. Chief Judge Mallard’s statement in *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E. 2d 794 (1971), is pertinent here:

Under G.S. 1A-1, Rule 8(d), allegations in pleadings are admitted when not denied in a responsive pleading if a responsive pleading is required. In this case a responsive pleading was required, and the defendant did not file an answer denying the allegations of the complaint. Therefore under the rule, the allegations were deemed admitted.

Hasty v. Carpenter

Acceptance Corp., 11 N.C. App. at 509, 181 S.E. 2d at 798. Thus, at the time defendant filed her motion to dismiss for lack of jurisdiction, the allegations of plaintiff's complaint were deemed admitted by defendant's failure to answer within the prescribed time limitations.

At this juncture defendant sought to defeat plaintiff's action by filing a motion to dismiss for lack of jurisdiction. This attempt failed, this court holding in the prior appeal that the trial court did have jurisdiction over defendant. *Hasty*, 40 N.C. App. 261, 252 S.E. 2d 274. Upon the failure of this attempt, the case reverted to the trial court in its pre-appeal posture, *viz.*, one in which the allegations of plaintiff's complaint were deemed admitted by defendant's failure timely to answer.

Rule 55(a) provides:

Entry. When a party against whom affirmative relief is sought has failed to answer or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff or otherwise, the clerk shall enter his default.

G.S. 1A-1, Rule 55(a). Plaintiff's 15 August 1977 motion for entry of default pursuant to this rule stated that defendant had failed to plead. The affidavit by one of plaintiff's attorneys filed with the motion stated that defendant had been served with the complaint in the action and had failed to answer or otherwise defend within the requisite time limit. Thus, plaintiff adequately informed the court, as required by Rule 55(a), of defendant's failure to answer; and entry of default was appropriate. Indeed, once grounds for entry of default have been established, entry is a "ministerial duty" generally performed by the clerk. *See Miller v. Miller*, 24 N.C. App. 319, 210 S.E. 2d 438 (1974); *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970); 2 McIntosh, N.C. Practice 2d § 1668 (Supp. 1970).

Here, however, the court rather than the clerk entered defendant's default. This court has stated with regard to entry of default that "[t]he judge of the superior court is in no way deprived of jurisdiction simply because the clerk, in certain instances, has concurrent jurisdiction." *Highfill v. Williamson*, 19 N.C. App. 523, 532, 199 S.E. 2d 469, 474 (1973). Thus Judge Lee

Hasty v. Carpenter

clearly had jurisdiction to enter defendant's default on 1 October 1979; and default having been established by defendant's failure timely to serve answer, the entry was appropriate.

Following the 1 October 1979 *entry* of default, a hearing was held on plaintiff's motion for *judgment* by default. The record indicates that defendant at that hearing moved in open court "for dismissal." The only motion which would have benefitted defendant at this juncture was a motion to set aside the entry of default. Such a motion may be granted "[f]or good cause shown." G.S. 1A-1, Rule 55(d). "The determination as to whether good cause exists to vacate an entry of default is addressed to the sound discretion of the trial judge." *Frye v. Wiles*, 33 N.C. App. 581, 583, 235 S.E. 2d 889, 891 (1977). Assuming, *arguendo* only, that defendant's motion "for dismissal" was in effect a motion to set aside the entry of default, the record discloses no basis for finding an abuse of discretion by the trial judge in declining to grant the motion.

The trial court having thus determined that the *entry* of default should stand, the sole question before it was whether plaintiff's motion for *judgment* by default should be granted. Default had been established. Once default is established, "defendant has no further standing to contest the merits of plaintiff's right to recover." *Acceptance Corp.*, 11 N.C. App. at 509-510, 181 S.E. 2d at 798 *quoting with approval* 3 Barron & Holtzoff, Fed. Prac. and Proc. (Wright Ed.) § 1216.

Defendant contends in her brief that the trial court erred at the hearing on plaintiff's motion for entry of judgment by default by refusing to allow introduction of 1) the deed conveying the *locus in quo* from Turner to defendant, and 2) two deeds of trust encumbering the *locus in quo* which defendant by an assumption clause in the deed assumed and agreed to pay. She sought by introduction of these documents to establish that the conveyance in question had been for a valuable consideration. She had at this juncture in the action no standing to present these documents as a defense on the merits, however, because she was deemed to have admitted the allegation in plaintiff's complaint that "Turner made a voluntary conveyance to defendant ... without consideration." *Acceptance Corp.*, 11 N.C. App. at 509-510, 181 S.E. 2d at 798. Exclusion of the documents by the trial court thus was proper; and there being no

Hasty v. Carpenter

evidence before the court on which to base a denial of the motion for judgment by default, the entry of judgment by default was appropriate.

The record indicates that, after the court announced its decision to enter judgment for the plaintiff on her motion for judgment by default, "[t]he defendant moved for a directed verdict for the defendant." A motion for a directed verdict is appropriate only in a jury trial. *Bryant v. Kelly*, 279 N.C. 123, 181 S.E. 2d 438 (1971); *Town of Rolesville v. Perry*, 21 N.C. App. 354, 204 S.E. 2d 719 (1974).¹ It presents the question of whether the evidence is sufficient to carry the case to the jury. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Defendant's motion for directed verdict was made following entry of judgment by default. No jury had been impaneled, and no evidence had been presented. The motion thus was inappropriate, and the trial court ruled correctly in denying it.

We find no basis in the record for disturbing the judgment of the trial court. Consequently, the judgment is

Affirmed.

Judges HEDRICK and CLARK concur.

¹These cases treated the defendants' motions as motions for involuntary dismissal under Rule 41(b). A motion for involuntary dismissal is a pre-judgment motion. The motion here was made subsequent to entry of judgment by default final.

Yates Motor Co. v. Simmons

YATES MOTOR COMPANY, INC., PLAINTIFF V. BEVERLY JANE SIMMONS,
DEFENDANT V. RENA BYNUM NOELL, MICHAEL W. NOELL AND
HUBERT WARREN NOELL, THIRD-PARTY DEFENDANTS

No. 8015DC824

(Filed 7 April 1981)

1. Costs § 3.1—acceptance of offer of judgment—allowance of attorney fees as part of costs

Where plaintiff accepted defendants' offer of judgment in a specified amount plus "costs accrued at the time this offer is filed," the trial court had authority to award to plaintiff attorney fees accrued at the time the offer of judgment was made as part of the costs then accrued.

2. Costs § 3.1—allowance of attorney fees as part of costs—"presiding" judge

In referring to the "presiding" judge in G.S. 6-21.1 as the official to assess attorney fees, the General Assembly did not contemplate that attorney fees would be properly allowed only if the case could not be settled prior to trial.

3. Costs § 3.1—allowance of attorney fee as part of costs—unwarranted refusal to pay claim

A finding of an unwarranted refusal by defendant to pay plaintiff's claim is required for the allowance of an attorney fee as part of the costs only in suits by an insured or beneficiary against an insurance company.

4. Costs § 3.1—discretion of court to award attorney fees

The fact that third party plaintiff ultimately agreed to accept a judgment for less than the amount offered her by third party defendants' insurance carrier before plaintiff's suit and her cross-claim were filed did not *ipso facto* deny her the benefit of G.S. 6-21.1, and the trial judge did not abuse his discretion in awarding a reasonable attorney fee to third party plaintiff in her action against third party defendant.

APPEAL by third-party defendants from *Paschal, Judge*. Judgment entered 23 May 1980 in District Court, ORANGE County. Heard in the Court of Appeals 10 March 1981.

This action arose out of a collision between automobiles belonging to third-party plaintiff, Simmons, and third-party defendants Noells. Plaintiff sought recovery for damage to her automobile in the amount of \$2,000.00, for loss of use of the car in the sum of \$1,540.00, and for an award of reasonable attorney's fees pursuant to the provisions of G.S. 6-21.1. After the pleadings were joined, an offer of judgment was made by defendants, pursuant to the provisions of G.S. 1A-1, Rule 68(a) of the Rules of Civil Procedure. Plaintiff then filed notice of acceptance of the offer of judgment, and subsequently filed a

Yates Motor Co. v. Simmons

motion for judgment and for the allowance of a reasonable attorney's fee to be taxed as a part of the cost of the action. Defendants responded, opposing plaintiff's motion for attorney's fees. Following a hearing, the trial court entered judgment for plaintiff awarding the sum set forth in the offer and acceptance judgment, \$536.64. In the judgment the trial court also awarded plaintiff the sum of \$624.00 for attorney's fees to be taxed as a part of the cost of the action.

Defendants have appealed from the portion of the trial court's judgment awarding attorney's fees.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Roger B. Bernholz, for Third-party plaintiff appellee.

Young, Moore, Henderson & Alvis, by Walter E. Brock, Jr., for Third-party defendant appellants.

WELLS, Judge.

The only issues presented in this appeal are (1) whether the trial court had authority to award attorney's fees to plaintiff and (2) whether the trial court abused its discretion in making such an award.

[1] I. *The authority of the trial court to award attorney's fees.*

Defendants' offer of judgment was as follows:

NOW COME THE THIRD PARTY DEFENDANTS, Rena Bynum Noell, Michael W. Noell and Hubert Warren Noell, pursuant to G.S. 1A-1, Rule 68(a) more than ten days before the trial of this action and offer that judgment be taken against them in this action for the sum of \$536.64 which includes 43 days for the use of the substitute vehicle at \$12.00 per day plus 4% sales tax. This offer also includes costs accrued at the time this offer is filed. If this offer is not accepted within ten days after its service, it shall be deemed withdrawn. This offer is made for the purposes set out in Rule 68(a) and for no other purposes.

. . . .

Plaintiff's notice of acceptance was as follows:

TO: Rena Bynum Noell, Michael W. Noell and Hubert Warren Noell, Third Party Defendants

Yates Motor Co. v. Simmons

Please take Notice that Beverly Jane Simmons, Defendant and Third Party Plaintiff, accepts offer of Judgment in the sum of \$536.64 tendered by Third Party Defendants herein, together with costs accrued at the time said offer was filed, including those costs taxed by the Court as attorney's fees pursuant to N.C. Gen. Stat. §6-21.1.

.

In support of their argument that G.S. 1A-1, Rule 68(a)¹ does not contemplate or authorize the inclusion of attorney's fees as a portion of the "costs then accrued", defendants first assert that "costs" in the form of attorney's fees had not accrued when the offer of judgment was filed and that the offer was limited to costs then accrued. In *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973) our Supreme Court considered a similar offer and acceptance of judgment and held that the cost should be construed so as to include attorney's fees as a part of the accrued cost. Defendants assert that *Hicks* was wrongly decided, and in support of that position cite *Cruz v. Pacific American Insurance Corporation*, 337 F. 2d 746 (9th Cir., 1964). In *Cruz*, the Court held that because attorney's fees in the case were discretionary with the trial court, they could not be considered as having accrued at the time the offer for judgment was filed under Federal Rule 68(a). Our examination of decisions of the Federal courts does not indicate that *Cruz* is being followed in other circuits. Compare, for example, *Mason v. Belieu*, 543 F. 2d 215 (D.C. Cir., 1976) where the Court interpreted Rule 68(a) to require the filing of a bill of cost in order to determine the portion of the attorney's fee which had accrued at the time of offer of judgment and, thus, the proper amount to be allowed as cost. Compare also *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo., 1978), involving attorney's fees allowable in a civil rights action. In *Scheriff*, defendant's offer of judgment included costs to date "not including attorney's fees". The Court held that Federal

¹Rule 68. Offer of judgment and disclaimer. (a) *Offer of judgment.* — At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. . . .

Yates Motor Co. v. Simmons

Rule 68(a) requires that an offer of judgment include payment of cost then accrued and that the Rule does not permit an offeror to choose which accrued cost he is willing to pay. The Court held the offer of judgment to be invalid because it excluded attorney's fees from "cost to date".

We reject defendants' argument and hold that the trial court clearly had the authority to award plaintiff's attorney's fees accrued at the time the offer of judgment was made as a part of the costs then accrued.

[2] Defendants next argue that by referring to the "presiding" judge in G.S. 6-21.1² as the official to assess attorney's fees, the General Assembly contemplated that attorney's fees would be properly allowed only if the case could not be settled prior to trial. That argument was presented to and rejected by the Court in *Hicks*, and we reject it here.

Defendants next argue that if *Hicks* is followed literally as to allowing attorney's fees accrued at the time of offer, the trial court has no discretion as to whether such fees are to be allowed, but is limited to setting only the amount of such fees. We find this argument to be entirely unpersuasive. Although our appellate courts have consistently held that G.S. 6-21.1 should be liberally construed to carry out the legislative intent, it is clearly within the discretion of the trial judge as to whether such fees shall be allowed. See *Black v. Insurance Co.*, 42 N.C. App. 50, 255 S.E. 2d 782, *disc. rev. denied*, 298 N.C. 293, 259 S.E. 2d 910 (1979); *Harrison v. Herbin*, 35 N.C. App. 259, 241 S.E. 2d 108, *cert. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978); *Hubbard v. Casualty Co.*, 24 N.C. App. 493, 211 S.E. 2d 544, *cert. denied*, 286 N.C. 723, 213 S.E. 2d 721 (1975). We see nothing in *Hicks* which would abrogate this long-standing rule.

² § 6-21.1. Allowance of counsel fees as part of costs in certain cases. — In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is two thousand dollars (\$2,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs. (Amended 1979).

Yates Motor Co. v. Simmons

[3] Finally, defendant contends that G.S. 6-21.1 does not authorize allowance of an attorney's fee absent a finding of an unwarranted refusal by defendants to pay plaintiff's claim. That argument was considered and rejected by this Court in *Rogers v. Rogers*, 2 N.C. App. 668, 671-72, 163 S.E. 2d 645, 648-49 (1968), where we held that such a finding is required only in suits by an insured or beneficiary against an insurance company. We believe that *Rogers* states the rule correctly, and we specifically uphold it in this case.

[4] II. *The discretion of the trial court to award attorney's fees.*

Defendants contend that if we find that the trial judge had the authority to award attorney's fees in this case, we should find that he abused his discretion in doing so. The factual context for this argument is as follows. Following the collision, plaintiff took her car to Yates Motor Company to be repaired. Yates sub-contracted the repairs to a body shop. Plaintiff leased a car from Yates for use during the repairs to her car. There were delays in the repairs. Plaintiff made a claim against defendants for property damage and for loss of use. Defendants' insurance carriers paid plaintiff the sum of \$1,222.01 for property damage and \$593.49 for loss of use. Plaintiff returned the \$593.49. Plaintiff disputed Yates' charges to her for rental of the leased vehicle and Yates brought suit against plaintiff for these charges. Plaintiff answered and cross-claimed against defendants, alleging damages for loss of use in the sum of \$1,540.00 and property damage in the sum of \$2,000.00. It is in this context that defendants argue that since their accepted offer of judgment, in the sum of \$536.64, was for less than the original offer by the insurance carrier, in the sum of \$593.49, plaintiff has acted unreasonably and is therefore not entitled to recover attorney's fees. This is but a different version of defendants' argument that attorney's fees in such cases as this should be allowed only where plaintiff can show an unwarranted refusal by defendants to pay plaintiff's claim, and again we must reject this contention. The record before us indicates that the trial judge was aware of all the circumstances leading up to defendants' offer, and plaintiff's acceptance of offer of judgment. As we view those circumstances, it is clear that plaintiff's entitlement to loss of use damages was significantly impacted by the action filed against her by Yates, and that plaintiff stated a valid defense to Yates' claim and a valid cross-claim against

State v. Lee

defendants as to loss of use damages measured by leased vehicle rent. Under such circumstances, the fact that plaintiff ultimately agreed to accept a judgment for less than the amount offered her by defendants' insurance carrier before the Yates' suit and her cross-claim were filed should not *ipso facto* deny her the benefit of G.S. 6-21.1. We hold that the trial judge did not abuse his discretion in awarding plaintiff a reasonable attorney's fee in this case.

The judgment of the trial court is

Affirmed.

Judges VAUGHN and BECTON concur.

STATE OF NORTH CAROLINA v. THEARPHA LEE

No. 805SC980

(Filed 7 April 1981)

1. Criminal Law § 26.3— misdemeanor prosecution dismissed – felony charge based on subsequent warrant and indictment – no double jeopardy

Defendant was not subjected to double jeopardy where the State initially proceeded against him by way of a magistrate's order, the district court judge presiding at defendant's probable cause hearing ruled that the proceedings were limited to a misdemeanor rather than the felony charged due to the wording of G.S. 90-108(b) and the fact that a magistrate's order formed the basis of the action, the case was dismissed by the district attorney's office on the same day as the probable cause hearing, and the next day the State obtained a warrant for defendant's arrest on the charges identical to those alleged in the original magistrate's order and an indictment was obtained against defendant for the felony, since jeopardy did not attach in the district court, defendant did not plead, nor was the case set for trial until sixteen days after the district attorney dismissed the case, and the prosecutor was free to institute felony charges against defendant by way of warrant and indictment.

2. Narcotics § 4— drug acquired by forged prescription – sufficiency of evidence

In a prosecution of defendant for feloniously and intentionally acquiring possession of a controlled substance in violation of G.S. 90-108(a)(10), there was no merit to defendant's contention that, since the pharmacist knew the prescription presented by defendant was invalid before filling it, defendant did not violate the statute, since the statute prohibits the possession of a controlled substance by "misrepresentation, fraud, forgery, deception or subterfuge"; and, according to the evidence, defendant obtained possession

State v. Lee

of the drug Talwin, a controlled substance, through the use of a forged prescription.

3. Narcotics § 3.1— needle marks on defendant's arm – admissibility of testimony

In a prosecution of defendant for feloniously and intentionally acquiring a controlled substance in violation of G.S. 90-108(a)(10), there was no merit to defendant's assignments of error dealing with an officer's testimony concerning needle marks on defendant's arm, since the prosecutor informed defense counsel as soon as he himself learned of the officer's intended testimony, and the prosecutor thereby complied with his duties required by the discovery statutes; moreover, defendant was not entitled to a voir dire hearing on the voluntariness of his submission to an examination of his arm by the officer, since this type of non-testimonial evidence is not within the protection of the Fifth Amendment.

4. Narcotics § 3.1— reputation of place or neighborhood – admissibility

In a prosecution of defendant for feloniously and intentionally acquiring possession of a controlled substance in violation of G.S. 90-108(a)(10), the trial court did not err in admitting testimony concerning the reputation of a house and a neighborhood as being an area of frequent drug use, though such evidence ordinarily constitutes hearsay and is inadmissible, since the evidence in this case was relevant to show defendant's intent when he acquired a prescription and purchased a syringe.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 28 March 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 February 1981.

The State initially proceeded against the defendant by way of a magistrate's order which charged that defendant feloniously and intentionally acquired possession of Talwin, a controlled substance, in violation of G.S. 90-108(a)(10). The district court judge presiding at defendant's probable cause hearing ruled that the proceedings were limited to a misdemeanor rather than the felony charged, due to the wording of G.S. 90-108(b), and the fact that a magistrate's order formed the basis of the action. The case was scheduled for trial in district court on 2 January 1980. The case was dismissed by the district attorney's office on the same day as the probable cause hearing.

The next day, the State obtained a warrant for defendant's arrest on the charges identical to those alleged in the original magistrate's order. An indictment was obtained against defendant for the felony.

The uncontroverted evidence at trial established that defendant presented a forged prescription, purportedly signed

State v. Lee

by Dr. David Turnbull, to a K-Mart pharmacist. Dr. Turnbull testified that he had neither written nor signed the prescription. The prescription purported to be written to Katie W. Cummings for 50 mg. of Talwin. A stipulation was read into evidence that Katie Cummings of the address listed on the prescription did not know the defendant, and had never received or given defendant a prescription in her name for Talwin.

Evidence for the defendant tended to show that the writing on the prescription was not in defendant's handwriting. Defendant testified that he received the prescription from a woman he knew as Katie Cummings at the "green house," a local gathering place, and, as a favor, agreed to get it filled for her. Defendant stated that he did not know the prescription was forged, or that the drug was a controlled substance, until advised by the police.

On cross examination the defendant also admitted buying a needle and syringe on the night in question from a man he saw on Eighth and Dawson Streets, but denied that they were for him; or that he knew they were for use in administering controlled substances in violation of the law.

Further evidence for the State tended to show that the area where defendant says he met the woman with the prescription and purchased the syringe is known as a drug use area. A Wilmington police officer testified that on the night defendant was arrested a search of defendant's person uncovered needle marks in his arm. The officer also testified that Talwin is often used like heroin, injected by syringe into the veins.

Defendant's motion to dismiss was denied at the close of all the evidence. From denial of various motions and errors assigned in the trial, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Joan H. Byers and Assistant Attorney General Christopher P. Brewer, for the State.

Newton, Harris & Shanklin, by Kenneth A. Shanklin, for defendant appellant.

ARNOLD, Judge.

[1] Defendant challenges the denial of his motion to dismiss the indictment on the claim of double jeopardy. He asserts that

State v. Lee

the State, by dismissing the case arising from the magistrate's order, which the district court judge limited to a misdemeanor proceeding, and then trying defendant on the felony based on a warrant and indictment, subjected defendant to double jeopardy for the same offense in violation of the United States Constitution. In the alternative, defendant claims that the prosecutor was estopped from trying the defendant on anything other than a misdemeanor through his choice of original criminal process — the magistrate's order — and the ruling of the district court that only a misdemeanor could be charged in such a document under the wording of the statute. We disagree with both arguments.

The statute which defendant was charged with violating states:

(a) It shall be unlawful for any person: . . .

(10) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

. . . .

(b) Any person who violates this section shall be guilty of a misdemeanor. Provided, that if the violation is prosecuted by an information, indictment, or warrant which alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violations shall be a felony punishable by imprisonment for not less than one year nor more than five years and a fine of not more than five thousand dollars (\$5,000).

G.S. 90-108(a)(10) and (b).

In accordance with the statute, the district court judge limited the proceedings on the magistrate's order to the trial of a misdemeanor violation of the statute, since the criminal process did not reach the level of an information or indictment. The district attorney then chose to dismiss the misdemeanor prosecution in accordance with G.S. 15A-931 and proceed against the defendant on the felony charge based on a subsequent warrant and indictment.

State v. Lee

North Carolina recognizes that jeopardy attaches “when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn.” *State v. Shuler*, 293 N.C. 34, 42, 235 S.E. 2d 226, 231 (1977). In a district court the requirements for jeopardy to attach are met “when a duly elected, qualified, and assigned District Court judge is present to sit as the trier of the facts” in that case. *State v. Coats*, 17 N.C. App. 407, 415, 194 S.E. 2d 366, 371 (1973).

Jeopardy did not attach in the district court since defendant did not plea, nor was the case set for trial until 2 January 1980, some sixteen days after the district attorney dismissed the case on 17 December 1979. The prosecutor was free to institute felony charges against the defendant by way of warrant and indictment, and defendant’s motion to dismiss based on double jeopardy arguments was properly denied. Jeopardy never attached in the proceedings based on the magistrate’s order.

Moreover, the district attorney was not estopped from proceeding against the defendant for the felony under the warrant and indictment after dismissal of the misdemeanor case. The effect of the district court’s order was that the State could try the defendant only for the misdemeanor if the magistrate’s order served as the criminal process. By dismissing the action based on the magistrate’s order, and obtaining a warrant and indictment against the defendant, the district attorney freed the State to proceed on the felony.

[2] Defendant’s challenge to the denial of his motions to dismiss and set aside the verdict is likewise to no avail. He contends that since the pharmacist knew the prescription was invalid before filling it, defendant did not violate the statute. This argument is rejected. G.S. 90-108(a)(10) prohibits the possession of a controlled substance by “misrepresentation, fraud, *forgery*, deception or subterfuge.” (Emphasis added.) According to the evidence, defendant obtained possession of the drug Talwin, a controlled substance, through the use of a forged prescription. In the light most favorable to the State the evidence showed that all the elements of the offense were established. Defendant’s motions were properly denied.

State v. Lee

[3] Assignments of error dealing with the officer's testimony concerning defendant's physical appearance also lack merit. The prosecutor informed defense counsel as soon as he himself learned of the officer's intended testimony concerning the needle marks on defendant's arm. Under the circumstances of this case the prosecutor complied with his duties required by the discovery statutes. *See*, G.S. 15A-903(e). Moreover, defendant was not entitled to a voir dire hearing on the "voluntariness" of his submission to an examination of his arm by the officer. This type of non-testimonial evidence is not within the protection of the Fifth Amendment. *See*, *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966); *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968).

[4] Finally, we hold that the trial court did not err in admitting testimony concerning the reputation of the "Green House" and Eighth and Dawson Streets as being an area of frequent drug use.

Defendant's testimony was that he had no idea he was using a forged prescription, and that he did not know why his sick friend at the Green House wanted a syringe. The State's position here is that the evidence in dispute was relevant to show defendant's intent when he acquired the prescription and purchased the syringe.

An element of the offense charged in this case included defendant's intent. G.S. 90-108(b). Ordinarily, evidence concerning the reputation of a place or neighborhood will constitute hearsay and be inadmissible. However, where such evidence shows intent with which an act is done, as in the case at bar, the evidence may be admitted. *See State v. Chisenhall*, 106 N.C. 676, 11 S.E. 518 (1890).

We also find no error in the judge's charge.

No error.

Judges CLARK and MARTIN (Harry C.) concur.

Thomas v. Howard

KENNETH THOMAS v. RICHARD HOWARD

No. 8020DC626

(Filed 7 April 1981)

1. Arbitration and Award § 9— attack on arbitration award

An arbitration award is ordinarily presumed valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the arbitrators acted improperly.

2. Arbitration and Award § 3— waiver of disability of arbitrator

The disability of an arbitrator is waived if the complaining party had prior knowledge of it.

3. Arbitration and Award § 9— attack on arbitration award — business dealings of arbitrator with plaintiff — knowledge by defendant

Defendant was not entitled to have an arbitration award set aside under G.S. 1-567.13(a)(2) because the arbitrator appointed by plaintiff had prior knowledge of the facts and a business connection with plaintiff where the written arbitration agreement between the parties shows that defendant accepted the arbitrator appointed by plaintiff with full knowledge of his business dealings with plaintiff and the possible bias that could result from that connection. Furthermore, even if defendant did not waive his right to complain about bias of the arbitrator appointed by plaintiff, defendant was not prejudiced by such bias where the award discloses on its face that the arbitrators reached a rational compromise, and where each party selected one arbitrator and those arbitrators selected a third person to act as a neutral umpire, the arbitration award was unanimous, the votes of the umpire and defendant's own arbitrator were sufficient to support the award, and defendant did not suggest that either his arbitrator or the umpire was improperly influenced by the arbitrator appointed by plaintiff.

APPEAL by defendant from *Huffman, Judge*. Judgment entered 22 April 1980 in District Court, ANSON County. Heard in the Court of Appeals 29 January 1981.

Plaintiff filed a motion to confirm an arbitration award made in his favor pursuant to the provisions of G.S. 1-567.12. The court denied defendant's opposing motion to vacate the award and entered judgment confirming the award.

The pertinent facts are these. Defendant purchased some heavy construction equipment from plaintiff. A contractual dispute developed between the parties as to the amount of the balance owed by defendant for the equipment. Plaintiff contended the amount of the debt was \$5,904.68, but defendant said it was only \$1,675.00. To settle the controversy, both parties

Thomas v. Howard

signed and sealed a written agreement to arbitrate the matter and abide by the final decision of three arbitrators in accordance with the provisions of Article 45A of the General Statutes.

Each party selected one arbitrator, and those two arbitrators subsequently selected a third person to act as a neutral umpire. Plaintiff appointed Boyd Collins as his arbitrator, and defendant appointed Tommy Howell. Ross Beine served as the umpire. The arbitrators then conducted a hearing in which they heard evidence from both parties and their witnesses and examined the relevant books and records. On 25 March 1980, after full deliberation, the arbitrators rendered the following unanimous decision:

We do decide that this is the sum due between the parties and we agree that Richard Howard [defendant] is due to Kenneth Thomas [plaintiff] said sum of \$3,775.00 and Kenneth Thomas is to return the pump to Richard Howard.

This sum is to draw interest from this draft until paid at the legal rate.

One week later, plaintiff filed a motion to confirm the award because defendant had failed to pay the sum determined by the arbitration. Defendant responded with a motion to vacate the award. In his motion, defendant attacked the validity of the award due to the alleged partiality of Boyd Collins, the arbitrator chosen by plaintiff:

That prior to his appointment as arbitrator Boyd Collins had personal knowledge of the facts in controversy between the parties as represented to him by Plaintiff; that Plaintiff discussed the facts of the case with Mr. Collins prior to his appointment as arbitrator; that Mr. Collins employed Plaintiff to perform certain work for him both before and after the appointment;

That Mr. Collins received this hearsay information concerning the case in the absence of the Defendant and the other arbitrators;

That having received hearsay information outside of the arbitration hearing and in the absence of the Defendant and the other arbitrators, Mr. Collins unintentionally committed an act improper for an arbitrator or a juror for

Thomas v. Howard

which he should have disqualified himself as an arbitrator in this proceeding.

That because of the information so obtained by Mr. Collins from his personal observation outside of the arbitration proceeding and from the Plaintiff, the rights of the Defendant to a fair and impartial hearing were prejudiced.

The judge denied defendant's motion, however, and held that, even taking his allegations as true, he had failed to state sufficient grounds for vacating the award as a matter of law. In addition, the judge found that the award was properly made in accordance with the arbitration agreement and General Statutes. The judge, therefore, entered an order confirming the award in all respects and directing defendant to pay \$3,775.00 to plaintiff.

E.A. Hightower, for plaintiff appellee.

F.D. Poisson, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's brief does not comply with the Rules of Appellate Procedure in several respects. It does not contain a statement of the questions presented for review. App. R. 28(b)(1). In addition, it does not include a short, nonargumentative summary of the essential facts. App. R. 28(b)(2). Finally, the brief makes no reference to the assignment of error or exception in the record which is pertinent to defendant's argument on appeal. App. R. 28(b)(3). In our discretion, we shall, nevertheless, address the merits of the case.

Defendant seeks reversal of the order confirming the arbitration award. In essence, he contends that a judge must vacate an award, as a matter of law, whenever there is evidence that one of the arbitrators had both prior knowledge of the facts and a business connection with one of the parties involved in the controversy. We disagree and affirm the judgment.

[1] The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. *Fashion Exhibitors v. Gun-*

Thomas v. Howard

ter, 41 N.C. App. 407, 255 S.E. 2d 414 (1979). Thus, an award is ordinarily presumed valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the arbitrators has acted improperly. See *Young v. Insurance Co.*, 207 N.C. 188, 176 S.E. 271 (1934); 5 Am. Jur. 2d, Arbitration and Award, § 156 (1962). See also *Fashion Exhibitors v. Gunter*, 291 N.C. 208, 230 S.E. 2d 380 (1976). Defendant has failed to meet this burden in the instant case.

It is, of course, true that public policy generally requires that arbitrators be impartial and that they have no connection with the parties involved or the subject matter of the dispute. Annot., 56 A.L.R. 3d 697 (1974). This principle is enforced in our State by G.S. 1-567.13(a)(2), which provides that a court shall vacate an award when there is "evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." Significantly though, the statute does not provide relief from an award when there is "evident partiality" by an arbitrator who is *not* appointed as a neutral or umpire. G.S. 1-567.13, by its terms, does not, therefore, necessarily prevent parties from accepting arbitrators who they know are acquainted in some way with the case or the parties.

Indeed, it is only natural that parties will attempt to appoint arbiters, who tend to be biased in their favor. A noted author has explained that:

One who submits his case to an arbitrator selects his own judge; and he selects one, if he can induce the other party to agree, who is likely to be prejudiced in his own favor.

If two parties are willing to take their chances before an arbiter so selected, it is now believed that there is no public interest that makes it necessary to forbid them.

6A Corbin, Contracts § 1433, at 394 (1962). Thus, the common sense rule evolved that, even though partiality of an arbitrator is a well-recognized ground for the setting aside of awards, a party may, nonetheless, be concluded by an award when he knew of the facts alleged to constitute the bias or prejudice of the arbitrator at the time the agreement was made. 5Am. Jur. 2d, Arbitration and Award, §§ 101, 181 (1962); Annot., 56 A.L.R. 3d 697, 703-04, 717-26 (1974).

Thomas v. Howard

[2] This rule, that the disability of an arbitrator is waived if the complaining party had prior knowledge of it, obtains in North Carolina. *Pearson v. Barringer*, 109 N.C. 398, 13 S.E. 942 (1891), is an instructive case. In *Pearson*, defendant sought to set aside an arbitration award because the arbitrator chosen by plaintiff was a surety on the prosecution bond and was, therefore, an interested party. In upholding the award, the Court stated:

It is well settled, that parties "knowing the facts, may submit their differences to any person, whether he is interested in the matters involved (*Navigation Co. v. Fenlon*, 4 W. & S. [Pa.], 205), or is related to one of the parties, and the award will be binding upon them." (6 Wait's Act. & Def., 519; Morse on Arbitration, 105). But if the submission be made in ignorance of such incompetency, the award may be avoided. No relief, however, will be granted unless objection is made as soon as the aggrieved party becomes aware of the facts, and if after the submission he acquires such knowledge and permits the award to be made without objection, it is treated as a waiver and the award will not be disturbed.

109 N.C. at 400, 13 S.E. at 943. Similarly, in the case of *Construction Co. v. Management Co.*, this Court refused to set aside an award where the judge had found as a fact, to which no exception was taken, that plaintiff knew of the extent and nature of the relationship between the arbitrator and defendant when he entered into the agreement. 37 N.C. App. 549, 555-57, 246 S.E. 2d 564, 566, *appeal dismissed*, 295 N.C. 733, 248 S.E. 2d 864 (1978). The Court applied the reasoning of *Pearson v. Barringer*, *supra*, and also emphasized that the record did not reveal a basis for judicial interference with the contractual rights of the parties "when each was aware and understood the contracts it entered into." *Id.* For analogous cases involving appraisal awards, see *Firemen's Fund Ins. Co. v. Flint Hosiery Mills*, 74 F. 2d 533 (4th Cir.), *cert. denied*, 295 U.S. 748, 79 L.E. 1692 (1935); *Young v. Insurance Co.*, 207 N.C. 188, 176 S.E. 271 (1934).

[3] Without question, the foregoing authorities apply to the instant case. Defendant accepted plaintiff's selected arbitrator, Boyd Collins, in the written arbitration agreement. In his motion to vacate the award, defendant did not even allege that he was unaware at the time he entered that agreement, of the

Thomas v. Howard

facts which indicated Collins' possible bias in plaintiff's favor. More importantly, the arbitration agreement itself compels the conclusion that defendant accepted Boyd Collins as an arbitrator with full knowledge of his business dealings with plaintiff and was aware of the possible bias that could result from that connection. The agreement includes the following stipulation: "The parties agree that Boyd Collins owes them \$80 and that Kenneth Thomas [plaintiff] gets \$20 and that the \$60 belongs to Richard Howard [defendant] and that Kenneth Thomas will take care of it." Since defendant knew of Collins' business association with *both* parties when he entered into the agreement, we hold that he has not stated sufficient grounds to vacate the award under G.S. 1-567.13.

Moreover, even if we assumed that defendant did not waive his right to complain about Collins' bias, defendant would still be unable to show that Collins' alleged corruption or misconduct *prejudiced* his right to a fair and impartial settlement of the controversy. G.S. 1-567.13(a)(2). Here, the parties sought arbitration because they could not agree as to whether the amount of a debt was \$5,904.68 or \$1,675.00. Viewed in this light, we hold that the award discloses, on its face, that the arbitrators reached a rational compromise, in the midst of much dispute, in finding that defendant owed plaintiff \$3,775.00. In addition, we would stress the unanimity of the arbitration award. In this case, an enforceable award could be rendered upon the concurrence of two arbiters.¹ In his motion to set aside the award, however, defendant did not attack the neutrality of the other two arbitrators, and he did not suggest that either of them was improperly influenced by Collins. We fail to see, therefore, how defendant could have been harmed by any alleged misconduct by Collins when the combined votes of the umpire and defendant's own arbitrator would have been sufficient to enter the award for \$3,775.00 in plaintiff's favor.

In conclusion, we would comment that, by enacting Article 45A, the legislature intended to encourage parties to submit disputed matters to arbitration when it is feasible and expe-

1. The arbitration agreement between plaintiff and defendant did not specify what constituted binding action by the arbitrators. Thus, G.S. 1-567.5 applied. That statute provides: "[t]he powers of the arbitrators may be exercised by a *majority* unless otherwise provided by the agreement or by this Article." (Emphasis added).

Cantey v. Barnes

dient for them to do so. *See, e.g.*, G.S. 1-567.2. This public policy includes, however, the judicial admonition "that a party who has accepted this form of adjudication must be content with the results." *DeFrayne v. Miller Brewing Co.*, 444 F. Supp. 130, 131 (E.D. Mich. 1978) [citing with approval, *Fashion Exhibitors v. Gunter*, 291 N.C. 208, 230 S.E. 2d 380 (1976)].

The order confirming the arbitration award is affirmed.

Affirmed.

Chief Judge MORRIS and Judge BECTON concur.

ISABELL CANTEY v. MRS. JOHN R. BARNES, D/B/A SUNSHINE
SELF-SERVICE

No. 8016DC734

(Filed 7 April 1981)

1. Negligence § 57.10— defective electric cord on laundromat floor – injury to patron – sufficiency of evidence of negligence

In an action to recover for personal injuries sustained by plaintiff when she stepped on an electric cord in a laundromat, experienced a shock, and was knocked to the floor, evidence was sufficient to be submitted to the jury where it tended to show that the electric cord on the floor in front of a drink machine placed in the laundromat for use by patrons was defective and unsafe; the defective and unsafe condition could have been discovered by a reasonable inspection of the premises by defendant; and failure of defendant to correct the defective and unsafe condition was a breach of duty constituting actionable negligence on the part of defendant. Additionally, plaintiff made out a sufficient case for the jury on the issue of defendant's negligence under the doctrine of *res ipsa loquitur*, since electric cords do not ordinarily shock people when stepped on in the absence of defective insulation or negligent construction, maintenance, or inspection; and defendant retained exclusive control of the electric cord prior to and immediately after the laundromat opened on the morning of plaintiff's injury.

2. Negligence § 58.1— action by invitee – instructions proper

In plaintiff's action to recover for personal injuries sustained when she received an electrical shock and was knocked down in defendant's laundromat, the trial court gave adequate instructions on the issue of negligence and the duty owed an invitee, and the trial court, in instructing on contributory negligence, did not intimate that defendant had admitted negligence.

Cantey v. Barnes

APPEAL by defendant from *Richardson, Judge*. Judgment entered on 23 April 1980 in District Court, ROBESON County. Heard in the Court of Appeals 12 February 1981.

This action for personal injuries sustained by the plaintiff, Isabell Cantey, as a result of a fall in a laundromat owned and operated by defendant, Mrs. John R. Barnes, was filed on 1 November 1979. Following a district court jury verdict and judgment awarding plaintiff \$5,000 in damages, the defendant appealed and assigned as error (1) the court's failure to grant defendant's motion for a directed verdict under Rule 50, (2) the court's failure properly to charge on the contentions of the party, and (3) the court's failure properly to charge on the duty of care owed to an invitee.

The facts as presented at trial are not in dispute. On 3 October 1978 the plaintiff arrived at the Sunshine Self-Service Laundromat shortly after it opened at 7:00 a.m. to do her laundry. The attendant, Donna Barnes, was the only person present in the laundromat at the time the plaintiff arrived. (Donna Barnes is not related to the owner, Mrs. John R. Barnes.) As was her custom, plaintiff asked Donna Barnes to do her laundry — to remove the clothes from the washing machine when the washing cycle was complete, to put the clothes in the dryer and to fold the clothes when they were dry. Donna Barnes "agreed to, but she stated she had to run and take her little boy to school and she would be right back and so I went and put my clothes in my washer." Donna Barnes left, leaving plaintiff alone in the laundromat.

After the plaintiff started the washing machine, she walked over to the soft drink machine to buy a soft drink. Before she had a chance to put her money into one of the machines, the plaintiff heard a noise like a gunshot, felt something go up her leg, and was knocked backwards to the floor. Her back and head hit the cement floor. When plaintiff was able to sit up, she saw smoke coming from an electrical cord in front of the drink machines. The electrical cord was raw and burnt in two; there was no insulation on either end. There was also a big black spot on the floor underneath the electrical cord. The laundromat was generally dirty, and on the morning of 3 October 1978 there was trash on the floor.

Cantey v. Barnes

As a result of the shock and fall, the plaintiff suffered injuries to her neck, back, both knees and right arm. She was treated at the emergency room of Southeastern General Hospital and was under the care of Dr. Woodrow W. Beck, Jr., a chiropractor, for approximately twelve weeks.

At the conclusion of the plaintiff's evidence, the defendant moved, pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, for a directed verdict on the grounds that the plaintiff had failed to prove negligence on the part of the defendant. Defendant further argued on the motion that if there were any evidence of negligence on the part of the defendant, then the plaintiff had contributed to her own injuries by her failure to exercise due care. The motion was denied. The defendant offered no evidence

McLean, Stacy, Henry & McLean, P.A., by Everett L. Henry, for defendant appellant.

Musselwhite, Musselwhite & McIntyre, by Donald A. Long, for plaintiff appellee.

BECTON, Judge.

[1] The defendant first argues that the court should have granted a directed verdict in her favor because the plaintiff "failed to show actionable negligence on the part of the defendant and has shown contributory negligence barring her recovery." We disagree. A directed verdict should be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). "[I]n considering a defendant's motion for a directed verdict, the court must view the evidence in the light most favorable to the plaintiff, resolving all conflicts in [her] favor and giving the plaintiff the benefit of every inference that reasonably can be drawn in [her] favor." 295 N.C. at 461, 245 S.E. 2d at 508-09.

Considering the evidence in the light most favorable to the plaintiff, the plaintiff was the first patron to enter the laundromat on the morning of 3 October 1978. Thus, the presence of the electrical cord in front of the soft drink machine could not have been caused by a third party. A reasonable inspection of the premises by the attendant before the laundromat was opened

Cantey v. Barnes

for business that day would have revealed the presence of the electrical cord in front of the drink machines. Although the electrical cord was obvious, its condition was not obvious to plaintiff.

Plaintiff was an invitee. It is true that a store owner is not an insurer of an invitee's safety. *Graves v. Order of Elks*, 268 N.C. 356, 150 S.E. 2d 522 (1966); *Fearing v. Westcott*, 18 N.C. App. 422, 197 S.E. 2d 38 (1973). However, the defendant, as owner of the premises, was under a duty to exercise ordinary care to keep that portion of the premises designed for use by invitees in a reasonably safe condition so as not to expose invitees unnecessarily to danger. *Sledge v. Wagoner*, 248 N.C. 631, 104 S.E. 2d 195 (1958). Because this duty to keep the premises in a reasonably safe condition implies a duty to make reasonable inspections and to correct unsafe conditions which a reasonable inspection would reveal, a breach of this duty constitutes actionable negligence on the part of the defendant. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Sledge v. Wagoner*, *supra*.

Applying the law to the facts and the reasonable inferences from the facts, the trial court properly denied the defendant's motion for a directed verdict. There was sufficient evidence to indicate (1) that properly insulated electrical cords do not ordinarily shock people who step on them; (2) that the electrical cord in front of the drink machine was defective and unsafe; (3) that the defective and unsafe condition could have been discovered by a reasonable inspection of the premises by the defendant; and (4) that the failure of the defendant to correct the defective and unsafe condition was a breach of duty constituting actionable negligence on the part of the defendant.

Additionally, plaintiff made out a sufficient case for the jury on the issue of defendant's negligence under the doctrine of *res ipsa loquitur*. In *Husketh*, the North Carolina Supreme Court applied the doctrine of *res ipsa loquitur* to a similar situation. The plaintiff in *Husketh* was flipped onto the floor when the bar stool on which she had just seated herself collapsed. The court noted that "[s]eating provided for use by customers of business establishments does not ordinarily collapse in the absence of negligent construction, maintenance, or inspection" and further noted that "a business proprietor re-

Cantey v. Barnes

tains exclusive control of such seating while it is being used by patrons for the purpose for which it was intended [citations omitted]." (Emphasis added.) 295 N.C. at 462, 245 S.E. 2d at 509. Similarly, electrical cords do not ordinarily shock people when stepped on, in the absence of defective insulation or negligent construction, maintenance, or inspection. Defendant retained exclusive control of the electrical cord prior to and immediately after the laundromat opened on the morning of 3 October 1978, and, we conclude, as did the *Husketh* court, that there was sufficient evidence of the defendant's negligence to go to the jury under the doctrine of *res ipsa loquitur*.

With respect to the issue of contributory negligence, it is important to point out that this is not a "slip and fall case" from an "observable and visible" condition. In this case, plaintiff fell and injured herself only after receiving an electrical shock. Moreover, this case does not involve an "obvious condition" with no defects; this case involves a condition that was in fact defective and not obvious. A reasonable person would not expect to be shocked by stepping on an electrical cord, and the mere fact that the plaintiff did so in this case does not constitute contributory negligence as a matter of law. See *Sledge v. Wagoner, supra*. The trial court properly allowed the issue to be decided by the jury, because the evidence, taken in the light most favorable to the plaintiff, failed to establish negligence on the part of the plaintiff so clearly that no other reasonable inference could have been drawn therefrom.

[2] Defendant's second and third assignments of error are combined in his second argument which reads: "[t]he court erred in its charge to the jury and in its instructions on the contentions of the parties and as to the law with respect to an invitee." We have viewed the entire charge and find it to be without prejudicial error.

The law is well settled: if the charge of the trial court, when considered as a whole, presents the law of the case so that there is no reasonable ground to believe that the jury was misled or misinformed, then it is not prejudicial error simply because a particular jury instruction might have been better stated. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967); *Jones v. Development Co.*, 16 N.C. App. 80, 191 S.E. 2d 435 (1972).

Cantey v. Barnes

The following exerpts taken from the Judge's charge are more than adequate on the issue of negligence and the duty owed an invitee:

The first issue is: Was Mrs. Cantey injured and damaged by the negligence of Mrs. Barnes in the operation of the washerette?

.

Now if you find that Mrs. Cantey has proven to you by the greater weight of the evidence that she was injured by the negligence of Mrs. Barnes in that she was negligent of [sic] the operation of the laundromat by her failure to inspect the premises and that to allow the electrical cord to be in a position and be in such a state as to cause her to be shocked and then injured, then you would answer the first question "yes" in favor of Mrs. Cantey.

.

Now, Mrs. Barnes, the owner of the laundromat is of the - to [sic] exercise the ordinary care is required to warn anybody using the premises of any hidden or concealed defects or damaged conditions which she the owner of the laundromat should have known about or would have known about with just reasonable inspection.

Now she, Mrs. Barnes, the owner of the laundromat is charged with knowledge of any condition which a reasonable inspection and supervision of the premises would reveal. She is charged with the knowledge of any dangerous or concealed conditions which her own conduct or that of any of her employees might have created.

Now let me also instruct you that the owner of the laundromat is not required to warn anybody using that premises of any obvious dangers or conditions. She does not have to warn any dangerous condition about which an invitee or somebody using the business would have had equal opportunity or either superior knowledge of the defect. A store owner is not an insurer of the invitee's safety.

The defendant contends that the trial court should have instructed the jury concerning the length of time the electrical

Cantey v. Barnes

cord had been on the floor, the knowledge of the defendant of the presence of the electrical cord, and the possibility that a third party had put the electrical cord down. When a trial court gives adequate instructions on the issue of negligence and the duty owed to an invitee, as was done in this case, it is not necessary to give the specific instructions now suggested by the defendant. This is particularly true given the facts of this case in which the evidence showed that the electrical cord ran from a drink machine; that the electrical cord was there when the laundromat opened on the morning of 3 October 1978; and that its presence would have been discovered by a reasonable inspection of the premises by the attendant prior to opening the establishment for business that day. (We note that defendant made no request for further instructions prior to the time the jury began its deliberations.)

The defendant also contends that the trial judge "intimated" that the defendant had admitted negligence. This occurred on two separate occasions when the judge said the defendant's contention was that the plaintiff was guilty of contributory negligence. This argument is without merit. The trial judge simply instructed the jury on the defense of contributory negligence which was raised in the defendant's own pleadings. Obviously the defendant was denying negligence, and the court's instructions on contributory negligence cannot be construed to be an admission of negligence on the part of the defendant. In fact, immediately after the court's statements on contributory negligence to which defendant excepts, the court in each instance further instructed the jury to the effect that "the burden of proof in this case has fallen on Mrs. Cantey to prove that Mrs. Barnes was negligent and that she failed to reasonably inspect or maintain her building out at the Sunshine business, that being a washerette." When the court has sufficiently instructed the jury, if the instructions are not as complete or detailed as a party desires, he should submit a request for special instructions. *Broadnax v. Deloatch*, 20 N.C. App. 430, 201 S.E. 2d 525 (1974). See also *Sims v. Manufacturing Corp.*, 32 N.C. App. 193, 231 S.E. 2d 287 (1977).

In both the *Sims* case and the case at bar, the trial judge at the end of his charge asked the parties if they desired further instructions, and in both cases the defendant did not. The charge of the trial court was more than adequate under the

Fungaroli v. Fungaroli

standards set by Rule 51 of the North Carolina Rules of Civil Procedure. The charge presented the law of the case in such a manner that there is no reasonable ground to believe that the jury was misled or misinformed. Therefore, there was no prejudicial error in the charge of the court.

The jury has spoken and, in this trial, we find

No error.

Judge VAUGHN and Judge WELLS concur.

JUDITH DIANE FUNGAROLI v. MICHAEL A. FUNGAROLI, BETTY S.
FUNGAROLI AND ROBERT MICHAEL FUNGAROLI

No. 8021SC582

(Filed 7 April 1981)

1. Process § 9.1—removal of child from N.C.—personal jurisdiction over defendant

The trial court properly concluded that it had personal jurisdiction over the nonresident defendant in an action to recover damages because of the wrongful removal of plaintiff's child from North Carolina in violation of a child custody order where plaintiff's complaint and affidavit supported the court's presumed finding that defendant participated in removing plaintiff's child from North Carolina, although defendant presented a contrary affidavit in which he denied participating in the removal of the child from this State.

2. Courts § 2.4—alleged absence of jurisdiction – motion to dismiss – notice and hearing

Defendant's contention that his procedural due process rights were violated because he did not receive notice and a hearing on his motion to dismiss the action against him for lack of personal jurisdiction is without merit where the court's order denying the motion to dismiss states that evidence was presented at a hearing by the attorney for plaintiff and the attorney for defendant, and no evidence to the contrary appears in the record.

APPEAL by defendant from *McConnell, Judge*. Order entered 18 February 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 January 1981.

By order of the District Court of Forsyth County, issued 8 August 1978, plaintiff was awarded the custody of Derek Cas-

Fungaroli v. Fungaroli

sidy Fungaroli, minor child of plaintiff and defendant Robert Michael Fungaroli.

On 12 October 1979, plaintiff filed a complaint alleging that the defendant, Robert Michael Fungaroli, acting in concert with both the codefendants, who are his parents, secretly left North Carolina with the minor child. They allegedly removed the child from this State for the purpose of defeating plaintiff's right to custody and in violation of G.S. 14-320.1. Thereafter, plaintiff allegedly went to the State of Virginia where defendants were residing with the child and demanded that they release the child to her. Plaintiff charged that the defendants refused to allow her even to see her child.

On 5 December 1979, defendant Michael A. Fungaroli, grandfather of the minor child, filed a motion asking the court to dismiss plaintiff's action as it pertained to him on the basis that the court was without *in personam* jurisdiction over him.

Plaintiff submitted to the court her affidavit in opposition to this motion. Defendant tendered his own affidavit in support thereof. Based upon these statements and the parties' pleadings the court entered its order on 18 February 1980 denying defendant Michael A. Fungaroli's motion to dismiss and declaring that the court did have personal jurisdiction over him. Defendant appeals from that order.

Wilson and Redden, by Harold R. Wilson, for plaintiff appellee.

Womble, Carlyle, Sandridge and Rice, by Keith W. Vaughan, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant contends that the trial court improperly denied his motion to dismiss plaintiff's action insofar as it applied to him, because the evidence in the record did not support the trial court's finding that it had personal jurisdiction over him.

Our "long-arm" statute, G.S. 1-75.4, determines those circumstances under which our courts have *in personam* jurisdiction. That statute reads in pertinent part as follows:

Personal jurisdiction, grounds for generally. — A court of this State having jurisdiction of the subject matter has

Fungaroli v. Fungaroli

jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

. . .

(3) Local Act or Omission. — In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

Subject to the limitations imposed by due process, this section should be liberally construed in favor of finding personal jurisdiction. *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978); *Dillon v. Funding Corp.*, 29 N.C. App. 513, 225 S.E. 2d 137 (1976), *rev'd on other grounds*, 291 N.C. 674, 231 S.E. 2d 629 (1977). In addition to meeting the statutory requirements, in order for a court to exercise its jurisdiction the defendant must be found to have certain minimum contacts with the State in compliance with due process requirements. *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E. 2d 640, *cert. denied*, 297 N.C. 300, 254 S.E. 2d 920 (1979); *Leasing Corp. v. Equity Associates*, *supra*.

Defendant does not argue that he did not have minimum contacts with this State. However, he does argue that the evidence before the trial court did not meet the statutory requirements of G.S. 1-75.4.

Plaintiff contended that defendant participated, along with the other two defendants, in the act of removing her child from North Carolina at the time of the custody hearing. In her complaint plaintiff alleged that:

VII. The plaintiff is informed, believes and therefore alleges that the defendant, Robert Michael Fungaroli, acting in concert with both the co-defendants, Michael A. Fungaroli and Betty S. Fungaroli, secretly left the State of North Carolina with the said minor child for the purpose of defeating the plaintiff's right to the custody and control of her said minor child; that the defendants, acting independently and jointly, did abduct said child and remove him from the State of North Carolina in Violation of G.S. 14-320.1.

Fungaroli v. Fungaroli

Plaintiff submitted her own affidavit in opposition to defendant's motion to dismiss. In further support of her contention that defendant participated in the removal of the child from the State, plaintiff, in her affidavit, stated:

Sometime subsequent to the date we were in Court, I do not remember the exact date, I again called the Fungarolis' home in Springfield, Virginia and Michael A. Fungaroli answered the phone. I asked him if my child was there and if I could see my child. He informed me that the child was there; that I did not have any right to see the child and that I would never see him again. I asked Mr. Fungaroli why they had taken the child out of the State of North Carolina after the Court had ordered that the child be returned over to me immediately. Mr. Fungaroli stated, "*We brought the child back to Virginia because the case is on appeal. We will win the appeal, and you will never see Derek again,*" (Emphasis added.)

Plaintiff insists that her pleading and affidavit constituted sufficient evidence from which the court could find that defendant participated in an act within this State that resulted in wrongful injury to plaintiff, thus giving the court *in personam* jurisdiction.

Defendant submitted his own affidavit in support of his motion to dismiss. In his affidavit he denied having taken part in the abduction of the child. His statements read as follows:

1. I am one of the defendants in the above case.
2. I have read the affidavit signed by Judith Diane Fungaroli on January 16, 1980 and filed in connection with this lawsuit. Her allegations in that affidavit which pertain directly to me are untrue.
3. I was not present during the custody case held in Forsyth County Civil District Court on August 7, 1978.
4. I did not take Derek Fungaroli out of the State of North Carolina immediately following the August 7, 1978 hearing or any time thereafter, nor did I ride in any vehicle with Derek Fungaroli when he was taken out of the State of North Carolina, nor did I assist in the transporting of Derek Fungaroli out of the State of North Carolina.

Fungaroli v. Fungaroli

5. I never told Judith Diane Fungaroli that I took Derek Fungaroli out of the State of North Carolina after the child custody hearing on August 7, 1978 or that I participated to any extent in his removal from the State.

Defendant maintains that the only evidence offered by plaintiff with respect to the issue of personal jurisdiction were her statements in her affidavit. These, he asserts, served only to raise a "suspicion, conjecture, guess, possibility, or chance" that her contentions were true. More significantly, defendant takes the position that the evidence presented by plaintiff and defendant was directly in conflict. This conflict in the evidence established an equipoise to the contentions advanced by the opposing parties. Defendant insists that since the record revealed no means by which the conflict in the evidence could be resolved and since the evidence was of equal weight, the trial court erred in ruling in favor of plaintiff, she being the party with the burden of proof.

Under G.S. 1A-1, Rule 52(a)(2), the trial judge need not make findings of fact and conclusions of law when making a decision on a motion unless they are requested by a party or required by Rule 41(b) which is not applicable here. Defendant did not make such a request in this case. "It is presumed, when the Court is not required to find facts and make conclusions of law and does not do so, that the court on proper evidence found facts to support its judgment. *Williams v. Bray*, 273 N.C. 198, 159 S.E. 2d 556 (1968); *Powers v. Memorial Hospital*, 242 N.C. 290, 87 S.E. 2d 510 (1955)." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E. 2d 509, 510-11 (1976). Although the trial court in the instant case did not actually make findings of fact in support of its order, we will presume that the trial court did find facts to support its decision and order. Therefore, we must assume that the trial court after reviewing the pleadings and affidavits of both parties decided to take as true plaintiff's contentions.

The trial judge's findings of fact when supported by competent evidence are conclusive upon this Court even when there is conflict in the evidence. *Morse v. Curtis*, 276 N.C. 371, 172 S.E. 2d 495 (1970); *Insurance Co. v. Lambeth*, 250 N.C. 1, 108 S.E. 2d 36 (1959). The trial judge must determine the weight and sufficiency of the evidence much as a juror. The presumed finding of fact

Fungaroli v. Fungaroli

that defendant participated in the alleged act of removing plaintiff's child from North Carolina is supported by both plaintiff's complaint and her affidavit. Therefore, we are bound by that finding of fact, and we think that there was no error in the trial court's denial of defendant's motion to dismiss based on these grounds.

[2] Defendant next contends that the trial court in denying his motion to dismiss failed to afford him his rights of procedural due process. Defendant insists that this is so for the following reasons: Defendant was afforded neither notice of hearing nor a hearing itself with regard to evidence concerning the motion to dismiss. The judge who signed the 18 February 1980 order was not commissioned to hold civil court in Forsyth County during that week. Defendant was not afforded an opportunity to request findings of fact prior to the entry of the trial court's order.

The record shows that defendant did not make a request for a hearing on his motion to dismiss. He submitted his own affidavit to the trial court in support of the motion. Judge McConnell's order denying defendant's motion states:

And the Court after hearing the evidence presented by the attorney for the plaintiff and the attorney for the defendant, Michael A. Fungaroli, finds that the Court does have jurisdiction over this cause of action and jurisdiction over the person of Michael A. Fungaroli. . . .

The judgment indicates that a hearing on defendant's motion was held. If a judgment is regular on its face the record is presumed to be valid until the contrary is shown by the proper proceeding. *Shaver v. Shaver*, 248 N.C. 113, 102 S.E. 2d 791 (1958). In this case we must assume from the judgment that the trial court did hold a hearing on defendant's motion, no evidence to the contrary appearing in the record. Consequently, defendant's assertions that his procedural due process rights were violated because he did not receive notice and hearing on his motion are specious. Defendant's remaining two contentions with regard to the alleged denial of his rights to due process do not merit discussion.

Affirmed.

Judges VAUGHN and BECTON concur.

State v. Watson

STATE OF NORTH CAROLINA v. JAMES BRYAN WATSON

No. 8013SC715

(Filed 7 April 1981)

1. Constitutional Law § 51— three months between arrest and trial – no denial of speedy trial

Defendant's Sixth Amendment right to a speedy trial was not violated where defendant was served with an arrest warrant for escape on 23 January 1980; defendant was tried on 15 April 1980, a delay of less than three months; an eleven week interval between arrest and trial was not inordinately long; the record did not suggest any purposeful or willful neglect by the prosecution in failing to bring defendant to trial sooner; the record did not show that defendant asserted his right to a speedy trial at any time prior to the motion to dismiss which he made at trial; and any prejudice resulting to the defense as a result of the eleven week delay was minimal.

2. Constitutional Law § 50— four years between offense and trial – due process right to speedy trial not denied

Defendant was not denied his due process right to a speedy trial by a four year delay between his escape on 19 December 1975 and his trial on 15 April 1980 where defendant did not turn himself over to authorities until 1 August 1977, and there was no evidence to indicate that the State could have located him from the time he escaped until the time he turned himself in; on 13 August 1977 defendant's conviction for second degree murder, for which he was originally imprisoned, was set aside as a result of a post-conviction hearing; this negated the State's basis for pursuing the escape charge; in August 1978 defendant was returned to custody following reversal by the Court of Appeals of the superior court's order, and the Supreme Court's subsequent refusal to review the matter put the original sentence back into effect; the delay involved was thus narrowed to a period of approximately eighteen months; defendant produced no evidence to demonstrate that the State deliberately delayed in accusing him of the crime of escape in order to impair his defense; nor did defendant demonstrate substantial prejudice to his defense due to the delay.

APPEAL by defendant from *McLelland*, Judge. Judgment entered 15 April 1980 in Superior Court, BLADEN County. Heard in the Court of Appeals 22 January 1981.

A bill of indictment was returned on 11 February 1980, charging defendant with feloniously escaping, on 19 December 1975, from the Department of Corrections Unit No. 4315, where he was serving a sentence for second degree murder. Defendant pleaded not guilty to these charges. A jury found him guilty of felonious escape, in violation of G.S. 148-45, and the court sentenced him to a term of a maximum of two years imprisonment to

State v. Watson

commence at the expiration of all sentences being served by him.

Attorney General Edmisten, by Assistant Attorney General Marvin Schiller, for the State.

Worth H. Hester for defendant appellant.

MORRIS, Chief Judge.

Defendant made a motion, at trial, to dismiss the indictment against him for the reason that under G.S. 15A-954(a)(3) defendant was denied his right to a speedy trial. The court heard defendant's argument on this motion, out of the presence of the jury, and denied it. Defendant argues on appeal that the court's denial of this motion was erroneous.

The record shows defendant escaped from the White Lake Prison Camp on 19 December 1975. At that time there was pending in the Cumberland County Superior Court a post-conviction hearing in the matter of his conviction for second degree murder. After leaving the prison camp defendant went to his home in Fayetteville and remained there until August 1977. On 1 August 1977, defendant voluntarily turned himself over to the authorities at Central Prison in order that his post-conviction hearing could be held. On 13 August 1977, hearing was held and Judge Donald Smith ordered that defendant be given a new trial on the charge of second degree murder. This Court reversed Judge Smith's order, and the Supreme Court denied defendant's petition for a writ of certiorari. During the period of the post-conviction proceedings, defendant was free on bond.

In August 1978, defendant was returned to the custody of the Department of Corrections.

The warrant of arrest in this escape case was served on defendant on 23 January 1980. The indictment in this matter was returned on 11 February 1980, and defendant was tried on 15 April 1980.

[1] Defendant claims that his Sixth Amendment right to a speedy trial was violated due to the length of the delay between the occurrence of the offense and the subsequent trial.

State v. Watson

The speedy trial provision of the Sixth Amendment to the Constitution has no application until a putative defendant in some way becomes "accused". *United States v. Marion*, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971). It affords no protection to one who has not yet been "accused". An individual becomes "accused" of a crime for the purpose of Sixth Amendment analysis when he is either arrested or indicted for the crime. See *United States v. Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2040, rehearing denied, 434 U.S. 881, 54 L. Ed. 2d 164, 98 S. Ct. 242 (1977); *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

Defendant was served with the arrest warrant for the escape offense on 23 January 1980, and he was tried on 15 April 1980. That constitutes a delay of less than three months.

[A] claim that a speedy trial has been denied must be subjected to a balancing test in which the court weighs the conduct of both the prosecution and the defendant. The main factors which the court must weigh in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. *Barkerv. Wingo*, *supra* [407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972)]; *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976); *State v. Brown*, 282 N.C. 117, 191 S.E. 2d 659 (1972); *State v. Johnson*, *supra* [275 N.C. 264, 167 S.E. 2d 274 (1969)]. No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E. 2d 383, 388 (1978). The burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or willfulness of the State. *State v. McKoy*, *supra*; *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

The length of the delay from the time of defendant's arrest until the time of his trial was approximately eleven weeks. That does not seem to us to constitute an inordinately long interval between the time of arrest and the time of trial. Certainly, the opposing parties need an adequate interval to prepare for trial.

State v. Watson

Minimal delays are inherent in all trials. The constitutional guaranty does not outlaw good faith delays which are reasonable and necessary for the State to prepare its case.

There was no reason given for the eleven week delay. The record does not suggest any purposeful or willful neglect by the prosecution in failing to bring defendant to trial sooner.

The record does not show that defendant asserted his right to a speedy trial at any time prior to the motion to dismiss which he made at trial. Defendant has a responsibility to assert his right to a prompt trial. Although the failure to assert the right has not been held to be a waiver of the Sixth Amendment right, it does make it difficult for a defendant to prove that he was denied his right to a speedy trial. *State v. Tindall*, 294 N.C. 689, 696, 242 S.E. 2d 806, 810 (1978); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

Finally, we think that the prejudice resulting to the defense as a result of the eleven-week delay was minimal. Defendant argues that he was prejudiced by the additional term of imprisonment which he must serve due to the escape conviction. This argument is specious. The prejudice material to this type of right violation is that which affects a defendant's ability to defend himself at trial. The fact that a defendant must serve a prison term for the conviction of a crime is not prejudicial. Defendant has not demonstrated to us, nor does the record show, that his defense to the charge of escape was prejudiced in any manner by the eleven-week delay.

Upon considering all four of the factors referred to in *McKoy*, we note that all four factors are weighted heavily in the favor of the State. Defendant has not shown one counterbalancing factor. Therefore, we hold that there was no violation of defendant's Sixth Amendment right to a speedy trial.

[2] Defendant does not specifically raise the issue of the possible violation of his right to due process under the Fourteenth Amendment in his brief. However, defendant's motion was made pursuant to G.S. 15A-954(c) which refers to a general violation of constitutional rights resulting from a denial of a speedy trial. Additionally, defendant continuously argues that the delay which resulted in prejudice to his rights was a four-year delay which originated at the time the escape occurred on

State v. Watson

19 December 1975 and ended at the trial on 15 April 1980. For these reasons we think it proper to consider whether defendant's due process rights were violated by the delay.

The due process right to a speedy trial relates to the period of time between the date of the occurrence of the alleged offense, and the date when a defendant is "accused" of committing the alleged crime. A defendant becomes "accused" of the crime for this purpose when he is either arrested or indicted, whichever occurs first. *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

Defendant allegedly escaped from prison on 19 December 1975, and the warrant for his arrest in connection with that escape was served on him on 23 January 1980. Thus, we must examine the State's reasons for this pre-indictment delay of almost four years.

The length of the delay is not always singularly determinative of the question of whether defendant has received a fair trial. Defendant escaped from prison on 19 December 1975 and did not turn himself over to the authorities until 1 August 1977. There is no evidence to indicate that the State could have located him during that period. On 13 August 1977, defendant's conviction for the second degree murder charge, for which he was originally imprisoned, was set aside as a result of the post-conviction hearing in Superior Court. This negated the State's basis for pursuing the escape charge. In August 1978, defendant was returned to custody following reversal by this Court of the Superior Court's order, and the Supreme Court's subsequent refusal to review the matter put the original sentence back into effect. This narrows the delay to a period of approximately eighteen months.

The burden is on the defendant who asserts the denial of his right to a speedy trial under the Fourteenth Amendment to show the delay was the result of the State's intentional and unnecessary postponement for its own convenience or advantage; and, "at least in the absence of intentional governmental delay for the purpose of harassing or gaining advantage over defendant, the burden is on defendant to affirmatively demonstrate actual and substantial prejudice." *State v. Dietz*, 289 N.C. 488, 491, 223 S.E. 2d 357, 359 (1976). Defendant has produced no evidence whatsoever to demonstrate that the State deliberate-

Pope v. Jacobs

ly delayed in accusing him of this crime in order to impair his defense. Nor has defendant demonstrated substantial prejudice to his defense due to the delay. "[P]rejudice will not be presumed merely upon a showing of a long period of delay." *State v. Branch*, 41 N.C. App. 80, 87; 254 S.E. 2d 255, 260 *appeal dismissed*, 297 N.C. 612, 257 S.E. 2d 220 (1979). Defendant has shown no good reason why the delay under the circumstances prejudiced his defense.

We hold that defendant's rights to a speedy trial under the Fourteenth Amendment and Sixth Amendment to the Constitution were not violated by the State's delay in bringing his case to trial. Accordingly, we find

No error.

Judges VAUGHN and BECTON concur.

FRANCES J. JACOBS POPE v. WILLIAM S. JACOBS

No. 8020DC837

(Filed 7 April 1981)

1. Attorneys at Law § 2—foreign attorney—appearance without meeting statutory requirements—harmless error

Plaintiff was not prejudiced by trial court's error in permitting a Michigan attorney to appear for a friend of the court from Michigan in a child custody hearing without complying with requirements of G.S. 84-4.1.

2. Divorce and Alimony § 23.6—child custody proceeding—refusal to exercise jurisdiction—more convenient forum

The district court did not err in declining to exercise its jurisdiction in a child custody proceeding upon concluding that a Michigan court is a more convenient forum as defined in G.S. 50A-7 where Michigan was the home State of the children; Michigan has had a closer connection with the family of the children than North Carolina; a Michigan court has entered no less than 19 separate orders in the matter; and the evidence as to treatment of the children by the children's father who had custody of the children was more readily available in Michigan than in North Carolina.

APPEAL by plaintiff from *Burris, Judge*. Order entered 31 March 1980 in District Court, STANLY County. Heard in the Court of Appeals 12 March 1981.

Pope v. Jacobs

The plaintiff appeals from an order of the District Court of Stanly County. That court declined to exercise its jurisdiction in an action for custody of minors after finding that the Circuit Court of Isabella County, Michigan is a more convenient forum. The parties to this action were married on 20 March 1966 and three children were born to the marriage. A judgment of absolute divorce between the parties was entered on 28 March 1973 by the Circuit Court for the County of Isabella, State of Michigan. The defendant was granted custody of the children by the Isabella County Circuit Court. The plaintiff then resumed her residence in Stanly County, North Carolina, where she had resided at the time of her marriage.

On 20 July 1979, while the children were visiting the plaintiff pursuant to the decree of the Isabella County Circuit Court, the plaintiff brought this action for custody of the children. In her complaint the plaintiff alleged certain abuses to the children by the defendant and prayed that she be granted custody of the children. The defendant filed an answer in which he denied he had abused the children and prayed that the complaint be dismissed. On 19 September 1979, the District Court of Stanly County entered an order in which it exercised temporary jurisdiction and awarded temporary custody of the children to the plaintiff. On 11 December 1979 the Isabella County Circuit Court entered an order giving the Isabella County Department of Social Services physical custody of the children and giving the legal custody of the children to the Isabella County Friend of the Court pending a hearing as to custody of the children. On 12 December 1979, a hearing was held in the District Court of Stanly County. The plaintiff appeared at the hearing and offered evidence. Also appearing were Miss Delores K. VanHorn, Friend of the Court, Isabella County, Mount Pleasant, Michigan, and Thomas J. Plachta, Assistant Prosecuting Attorney for Isabella County. Mr. Plachta represented Miss VanHorn at the hearing. The defendant did not appear.

After the hearing, the court made findings of fact, among which was a finding that the Circuit Court of Isabella County had been involved in the custody of the minor children since 1971 and had entered not less than 19 separate orders in the matter. The District Court of Stanly County concluded that the Circuit Court of Isabella County is a more convenient forum as

Pope v. Jacobs

defined in G.S. 50A-7 and declined to exercise jurisdiction. The plaintiff appealed.

Hopkins, Hopkins and Tucker, by William C. Tucker, for plaintiff appellant.

Delores K. VanHorn in propria persona for the Isabella County Friend of the Court.

No brief for the defendant.

WEBB, Judge.

[1] The appellant's first assignment of error deals with the court's allowing Thomas J. Plachta, an attorney licensed in the State of Michigan to appear for the Isabella County Friend of the Court. The court did not require Mr. Plachta to comply with G.S. 84-4.1 which governs the appearance by out-of-state attorneys in the courts of this state. The appellant, while conceding that it is in the court's discretion as to allowing an out-of-state attorney to participate in a trial in this state, argues that the court has no discretion if there is not a compliance with G.S. 84-4.1. Although there was not a compliance with the statutory requirements in allowing Mr. Plachta to represent the Isabella County Friend of the Court the appellant has not demonstrated any prejudice to her by this error. This assignment of error is overruled.

[2] The appellant's second assignment of error deals with the court's declining to exercise jurisdiction. The case sub judice is governed by the Uniform Child Custody Jurisdiction Act, Chapter 50A of the North Carolina General Statutes. Among the act's stated purposes according to G.S. 50A-1 are to "[a]void jurisdictional competition" and to "[p]romote cooperation with the courts of other states." G.S. 50A-3 provides:

(a) A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

* * *

- (2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State sub-

Pope v. Jacobs

stantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or

- (3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent. . . .

Under the allegations of the complaint and the proof offered at the hearing, the court was authorized to take jurisdiction and award custody under the above-quoted provisions of the statute.

The question posed by this appeal is whether the court committed error by declining to exercise its authority to assume jurisdiction. G.S. 50A-7 provides:

(a) A court which has jurisdiction under this Chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

- (1) If another state is or recently was the child's home state;
- (2) If another state has a closer connection with the child and the child's family or with the child and one or more of the contestants;
- (3) If substantial evidence relevant to the child's present or future care, protection, training, and personal relationships is more readily available in another state;

Walters v. Tire Sales & Service

- (4) If the parties have agreed on another forum which is no less appropriate; and
- (5) If the exercise of jurisdiction by a court of this State would contravene any of the purposes stated in G.S. 50A-1.

In determining whether it was in the best interest of the children that the District Court of Stanly County decline to exercise jurisdiction, the court had before it evidence that Michigan is the home state of the children; Michigan has had a closer connection with the family of the children than North Carolina; and the evidence as to the treatment of the children by the children's father who had custody of the children is more readily available in Michigan than in North Carolina. We hold the court did not err in declining to exercise jurisdiction.

Affirmed.

Judges HEDRICK and HILL concur.

HOMER WALTERS AND MACK DONALD CHESTNUTT T/A C & W
TRUCKING v. TIRE SALES & SERVICE, INC., A CORPORATION

No. 8012SC816

(Filed 7 April 1981)

1. Negligence § 29.1— installation of inner tube— sufficiency of evidence of negligence

In an action to recover for property damage based on negligence in the installation of tires by defendant on plaintiffs' truck, evidence was sufficient to be submitted to the jury where it tended to show that, at the time a tire and inner tube were installed on plaintiffs' truck, the inner tube was too large for the tire and this caused the tube to fail, which in turn caused a blowout resulting in damage to plaintiffs' truck.

2. Negligence § 29.3— tire blowout — connection between defendant's negligence and accident

In an action to recover property damages based on negligence of defendant in installing tires on plaintiffs' truck, there was no merit to defendant's contention that plaintiffs failed to establish a causal connection between the action of defendant and the accident in question, since an expert in the field of mechanical engineering and failure analysis testified that, in his opinion, the inner tube was too big for the tire at the time it was installed, causing

Walters v. Tire Sales & Service

creases in the tube which in turn caused the tire failure; this testimony was struck on motion of defendant and the witness was allowed to testify only that in his opinion the creases could or might have caused the failure; the witness was thus not allowed to testify to the degree of certainty which he had as to causation, and defendant then moved for dismissal because the witness was not certain enough; and the trial court erred in striking the witness's answer that, in his opinion, the creases caused the tire failure.

3. Negligence § 27— condition of tire — testimony by non-expert

In an action to recover for property damages based on negligence in the installation of tires on plaintiffs' truck by defendant, the trial court erred in excluding testimony by plaintiffs' witness that he checked the tire in question before the trip giving rise to the accident and it did not appear to be flat or leaking air, since such testimony tended to prove that the tire was full before the blowout and was relevant to the issues involved in the case; and there was no merit to defendant's contention that the witness could not testify to this matter without being qualified as an expert.

APPEAL by plaintiffs from *Lane, Judge*. Judgment entered 15 May 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 March 1981.

This is an action for property damage based on negligence and breach of warranty by the defendant. The plaintiffs' evidence showed that in 1975 they owned a 1975 Transtar II International Tractor, cab-over. On 14 March 1975, they purchased from the defendant in Fayetteville, North Carolina, ten tires which were installed by the defendant on their truck. No maintenance was performed on the tires other than checking them for air pressure before 29 June 1975. Mack Donald Chestnutt testified he was driving the truck on 29 June 1975 on Highway 276 west of Clinton, South Carolina. The truck started "pulling" to the right and he lost control of it. The truck ran into the median and turned over, suffering severe damage. When Mr. Chestnutt inspected the truck immediately after the accident, the right front tire was missing, and he was unable to find it.

Richard G. Fennell testified that in the latter part of June 1975, he went to a point on U.S. Highway 276 between Clinton, South Carolina and Laurens, South Carolina and found a tire which was identified as being the tire which had been on the right front wheel of the truck. There were parts of a tube within the tire. The tire and tube were delivered to James Dezern who gave them to John C. Cerny. Mr. Cerny was found to be an expert in the field of mechanical engineering and failure analy-

Walters v. Tire Sales & Service

sis. He testified that he examined the tire and the tube and from his examination he concluded there had been a catastrophic failure or "blowout" of the tire. He found some creases in the inner tube which would have been caused by the inflation of a tube which did not fit the tire. If the tube had been too big for the tire, it would crease or fold when inflated and as the tube revolved while the truck was being driven, the tube would weaken along these creases which would cause it to fail. In his opinion the tube was too big for the tire at the time it was installed either because it was too large when it was manufactured or it had been stretched after manufacture and the creases occurred when the tube was placed in the tire and inflated. Mr. Cerny was asked a hypothetical question which incorporated the matters offered in evidence. In answer to the hypothetical question, he stated that in his opinion the tube could have been the cause of the "blowout" of the tire.

At the end of the plaintiffs' evidence, the court granted the defendant's motion to dismiss. The plaintiffs appealed.

James R. Nance, Jr. for plaintiff appellants.

Russ, Worth, Cheatwood and McFadyen, by Philip H. Cheatwood, for defendant appellee.

WEBB, Judge.

At the outset, we note that the act of alleged negligence which the plaintiffs contend caused damage to their truck occurred in North Carolina. The accident occurred in South Carolina. South Carolina law governs as to whether the defendant is liable for the alleged negligence. *See Chewning v. Chewning*, 20 N.C. App. 283, 201 S.E. 2d 353 (1973). We believe the law of South Carolina governing liability for negligence is the same as the law of this state so far as the issues are concerned in the case sub judice. *See Mahaffey v. Ahl*, 264 S.C. 241, 214 S.E. 2d 119 (1975) and *Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 212 S.E. 2d 925 (1975). In this opinion we do not distinguish between the law of the two states in applying the principles of liability for negligence to the evidence in the case sub judice.

[1] The plaintiffs have offered evidence from which the jury could find that at the time the tire and inner tube were installed on the plaintiffs' truck, the inner tube was too large for the tire and this caused the tube to fail which was the cause of the

Walters v. Tire Sales & Service

“blowout.” From this we believe the jury could find the defendant did something which a reasonable man would not do and this was a proximate cause of the accident. It was error to grant the defendant’s motion to dismiss the action. *See* 9 Strong’s N.C. Index 3d, *Negligence* § 1 for a definition of negligence. The defendant contends there was not sufficient evidence in the record to support a finding that the defendant installed the tire and tube. Mr. Chestnutt testified the truck was carried to the defendant’s place of business on 14 March 1975, and the tire was installed. It stayed on the truck until the date of the accident more than three months later. This is evidence from which the jury could find the defendant installed the failed tire and tube. The defendant also contends that the testimony of Mr. Cerny that the tube was too large for the tire placed no responsibility on the defendant. We believe it is a jury question as to whether the defendant, who was in the business of selling tires, acted as a reasonable man in that business in installing a tire with a tube which was too large. *See* W. Prosser, *Handbook of The Law of Torts*, § 32, p. 161 (4th Ed. 1971) for a discussion as to the duty of a reasonable man with superior knowledge in a certain trade.

[2] The defendant also argues that the plaintiffs failed to establish a causal connection between the action of the defendant and the accident in question. On cross-examination Mr. Cerny testified he could find no puncture marks on the tire but if there had been a puncture on the part of the tire he was not able to examine, this could have caused a loss of air. He also testified that driving on the tire while it was underinflated or if the truck was overloaded could damage the tire. The defendant contends these answers on cross-examination leave it to the jury to speculate as to the cause of the failure of the tire. We note that the expert witness testified that in his opinion, the creases in the tube caused the tire failure. This answer was struck on motion of the defendant and the witness was only allowed to testify that in his opinion the creases could or might have caused the failure. It appears that we have a case in which the witness was not allowed to testify to the degree of certainty which he had as to causation and the defendant then moved for dismissal because the witness was not certain enough. *See* 1 Stansbury’s N.C. Evidence § 137 (Brandis rev. 1973). In *Mann v. Transportation Co.* and *Tillett v. Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973) Chief Justice Sharp indicated that it is

Walters v. Tire Sales & Service

proper for an expert to be allowed to conform his answer as to causation to his true opinion. We hold it was error to strike Mr. Cerny's answer that, in his opinion, the creases caused the tire failure. We believe it was a question for the jury as to whether the other possibilities raised by the witness's answers on cross-examination were the causes of the failure.

[3] Henry W. Denby appeared as a witness for the plaintiffs. He testified he was a truck driver and was riding with Mr. Chestnutt at the time of the accident. He also testified that he checked the right front tire before he began the trip and it did not appear to be flat. He testified further: "It was not leaking air." On motion of the defendant, this statement was stricken. This was error. We believe the jury would have no difficulty deducing that this was the witness's shorthand way of saying that from his examination of the tire, he could not determine that it was leaking. This testimony tended to prove that the tire was full before the failure and was relevant to the issues involved in this case. The defendant contends the witness could not testify to this matter without being qualified as an expert. We do not believe a witness has to be an expert to testify as to whether a tire is leaking.

The appellants have not assigned error to the dismissal of their claim for breach of warranty. We affirm the dismissal of this claim.

We do not discuss the matters brought forward by the appellant's other assignments of error as they may not recur at a subsequent trial.

Reversed and remanded.

Judges HEDRICK and HILL concur.

State v. Rick

STATE OF NORTH CAROLINA v. GEORGE McCALL RICK

No. 8027SC999

(Filed 7 April 1981)

Criminal Law § 34.8—rape case — competency of evidence of other assaults

In this prosecution for rape, evidence that defendant committed assaults on two other women on the same date as the rape was competent to show defendant's state of mind and his common scheme and design to apply physical force in the commission of crimes of violence; furthermore, the two assaults were sufficiently close in time to the alleged rape that the incidents "presented circumstances, not too remote in time to have probative value, which tended to aid the jury in understanding the conduct and motives" of defendant.

Judge WEBB dissenting.

APPEAL by defendant from *Lewis, Judge*. Judgment entered 19 June 1980 in Superior Court, LINCOLN County. Heard in the Court of Appeals 3 March 1981.

Defendant was charged in a proper bill of indictment with the 11 March 1980 first degree rape of Brenda Leigh Allen. Defendant pleaded not guilty and was found guilty of second degree rape. From a judgment imposing a prison sentence of twenty years minimum, twenty-five years maximum, he appealed.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Thomas M. Shuford, Jr., for the defendant appellant.

HEDRICK, Judge.

Defendant's sole assignment of error is set out in the record as follows:

Defendant appellant contends that it was error for the trial judge to admit the testimony of Susan Diane Cogdill and Miss Carrie Jenkins on the grounds that such judicial action was in violation of the rule of law prohibiting the State from offering evidence that the accused had committed other distinct independent or separate offenses.

After the prosecuting witness had testified that defendant came to her home, went outside with her, and raped her at

State v. Rick

approximately 9:00 p.m. on 11 March 1980, Mrs. Susan Cogdill was allowed over defendant's objection to testify as follows:

I was at the Armory on March 11, 1980 a little after 5:00. . . . My little girl and her friend was taking baton lessons at the Armory. . . . [T]hey were about finished, so I came out to pull the car around to pick them up. . . . In the meantime the defendant George Rick was coming up on my side of the car. I did not know Mr. Rick before that day. . . . I saw him walking coming toward my door as if he was going to ask me something. I was fixing to roll the window down when he jerked the door open, and he said "Move over;" and I said "No." He said "I said move over" and I again said "No;" and he was pushing me. When I wouldn't move over in the car he started choking me with his hands. I could hardly get my breath, but I managed to tell my daughter to go get help. . . . He started choking me harder and I knew if I didn't get him out of the car I was afraid something would happen if he took the car, so I pushed him as hard as I could, and he hit the road. . . . [H]e got up and ran . . . up the hill and went into the woods.

Mrs. Carrie Jenkins was then allowed over defendant's objection to testify as follows:

. I live alone. . . .

The Armory is right down from behind my house. . . . I had never seen the defendant prior to March 11th. On the afternoon of March 11th I went to the grocery store and got back to my house around 5:30. . . . I got out of the car . . . and went in the house . . . and then went in the living room and sat down in a chair. George Rick walked in my house and asked me if I was alone, and I told him yes. He said "Well, I'm going to rob you." I said "What you gonna rob me for? I ain't got no money." . . . He got me by the shoulders and pulled me up out of the chair and made me walk backwards to my bedroom, shoved me down on the bed and told me to pull my clothes off. I started to raise up to unbutton my blouse and when I did he hit me; . . . He then grabbed my blouse and jerked it open and I just had my arms in the sleeves. He asked me where the car keys was, and I told him . . . in the kitchen. He went in there and got the keys and my little kitchen knife and came back in my bedroom and cut

State v. Rick

the rest of my clothes off; . . . all I had on was just my arms in the blouse. Then he cut one of my blankets and got some pieces to tie me up. He tied my hands . . .

He took the keys and went outside and tried to start the car. . . . I saw him coming back . . . [a]nd he came in then, choked me and asked me which key starts the car. I could hardly get my breath and I picked the key out . . . He said "Now, lay there 5 minutes," and he went out the door . . .

[I] saw the defendant driving my car out the driveway. . . .

Citing *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), defendant argues that the foregoing evidence was irrelevant, prejudicial, and for no other purpose than to show his disposition to commit the offense of rape, the crime with which he was charged.

Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime [footnotes omitted].

1 Stansbury's N.C. Evidence § 91 (Brandis rev. 1973), at 289-290. Thus, proof of commission of other like offenses has been held competent to show *quo animo* (state of mind), intent, design, guilty knowledge, or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstantial evidence with respect to the matter being tried, when such offenses are so connected with the offense charged as to throw light upon one or more of these questions. *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 54 L. Ed. 2d 288, 98 S. Ct. 414 (1977); *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516, *cert. denied*, 414 U.S. 1042, 38 L. Ed. 2d 334, 94 S. Ct. 546 (1973).

In *State v. Humphrey*, *supra*, where the defendant was charged with raping a woman at Meredith College, evidence was admitted that several hours after the incident, the defendant followed a woman home and while completely naked walked up and stood in the next yard until the woman got into her automobile and turned on the headlights. Our Supreme Court, in discussing the relevancy of this testimony, stated: "The evi-

State v. Rick

dence here challenged was competent to show defendant's *quo animo*, or state of mind." *Id.* at 572, 196 S.E. 2d at 518.

In *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973), where the defendant was charged with raping a Duke University coed, the evidence tended to show that around 9:30 p.m. the defendant drove up in his automobile to a bus stop where the prosecuting witness was standing and offered her a ride to her dormitory; after she got in, however, he took her to rural Orange County, where the alleged rape occurred. Another coed, Miriam Kaufman, was allowed to testify that at approximately 4:40 p.m. the same day defendant drove up and asked her for a ride while she was standing at the bus stop, and after she got in, he drove into rural Orange County, where she became frightened and jumped out of the automobile. A third girl, Carol Chase, was allowed to testify that at about 4:30 p.m. that day defendant stopped his automobile and asked her if she wanted a ride to the Duke campus, but she refused. In discussing the relevancy of Kaufman's testimony, our Supreme Court said: "In our opinion, Miriam Kaufman's testimony clearly disclosed a common plan, scheme and design by defendant to pick up a female person and carry her into rural Orange County in order to gratify his sexual desires." *Id.* at 49, 199 S.E. 2d at 428. With respect to the relevancy of Chase's testimony, the Court said that it "presented circumstances, not too remote in time to have probative value, which tended to aid the jury in understanding the conduct and motives" of the defendant. *Id.* at 49, 199 S.E. 2d at 429.

In the present case, the testimony given by Mrs. Cogdill and Mrs. Jenkins was relevant, in our opinion, to show defendant's state of mind and his common scheme and design to apply physical force in the commission of crimes of violence. Furthermore, the incidents to which Mrs. Cogdill and Mrs. Jenkins testified are sufficiently close in time, about four hours, to the alleged rape of Ms. Allen that the incidents "presented circumstances, not too remote in time to have probative value, which tended to aid the jury in understanding the conduct and motives" of defendant. The testimony given by Mrs. Cogdill and Mrs. Jenkins would thus be admissible, and defendant's sole assignment of error is not sustained.

We hold that defendant had a fair trial free from prejudicial error.

State v. Lednum

No error.

Judge HILL concurs.

Judge WEBB dissents.

Judge WEBB dissenting:

I dissent. I believe the majority has correctly stated the rule as to the admission of evidence of other offenses, but I do not believe it was properly applied in this case. The State offered testimony of two other assaults with intent to commit rape by the defendant on the same day as the crime of which the defendant was charged. I believe their only relevancy was to show the character of the accused or his disposition to commit an offense of the nature of the one charged. The majority relies on *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973) and *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973). I would agree that these cases, particularly *Arnold*, stretch the exception to the rule that evidence of a crime is not admissible to prove another crime. I believe the rule is still viable, however. I would distinguish *Humphrey* on the ground that the defendant was relying on an irresistible impulse as a defense. Evidence of another crime was admissible to show his state of mind. I would distinguish *Arnold* on the ground that evidence of the independent crime attempted was so similar to the alleged offense that it was admissible to corroborate the pattern of action in the alleged crime at issue. I vote for a new trial.

STATE OF NORTH CAROLINA v. LEXIE LEDNUM

No. 8022SC995

(Filed 7 April 1981)

1. Criminal Law § 99.2—conduct of court during trial — no expression of opinion

The trial court did not impermissibly comment on the evidence or express an opinion in instructing defense counsel not to lead witnesses; in responding to the prosecution's objections by saying, "sustained to leading" or "sustained"; in allowing or refusing to allow allegedly repetitive questions; or in repeating testimony which the trial court did not want the jury to consider.

State v. Lednum

2. Assault and Battery § 15.2— knife as deadly weapon per se – instruction proper

In a prosecution of defendant for assault with a deadly weapon inflicting serious injuries, the trial court did not err in instructing the jury that a knife was a deadly weapon, since evidence of the victim's injuries, hospitalization, treatment and absence from work clearly showed that he suffered serious injuries, and such evidence was sufficient to require the trial court to find that the knife was a deadly weapon per se.

3. Assault and Battery § 13—defendant having affair with victim's wife – relevancy of evidence

In a prosecution of defendant for assault with a deadly weapon inflicting serious injuries, the trial court did not err in allowing the victim to testify that defendant was having an affair with the victim's wife, since such evidence was relevant to show the state of mind of the victim.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 29 May 1980 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 3 March 1981.

Defendant was charged under a proper bill of indictment with feloniously assaulting Randy Cannon with a deadly weapon, a knife, and inflicting serious injuries not resulting in death by cutting Cannon about the face and stabbing him in the chest. He was found guilty as charged. From a judgment imposing a prison sentence of not less than two nor more than ten years, which was suspended and which placed defendant on probation, defendant appealed.

Attorney General Edmisten, by Associate Attorney Reginald L. Watkins, for the State.

Barnes, Grimes & Bunce, by Jerry B. Grimes and D. Linwood Bunce II, for defendant appellant.

HEDRICK, Judge.

[1] In his first question presented, defendant argues that the trial judge

impermissibly commented on the evidence at trial . . . when he continuously refused to sustain the defendant's objection to the State's leading question and in turn sustained practically every objection made by the State for the same type of questions and otherwise made comments evidencing his bias towards the State's case.

Those exceptions discussed under this question which refer

State v. Lednum

solely to the judge's ruling on evidence do not raise an issue as to whether the judge expressed an opinion in violation of G.S. § 15A-1222. In *State v. Cox*, 6 N.C. App. 18, 24, 169 S.E. 2d 134, 138 (1969), we noted: "It has been held that a remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. [Citations omitted]." In a later case the North Carolina Supreme Court found that the trial court did not express an opinion on the credibility or guilt of defendant in sustaining the prosecutor's objections on ten occasions to questions propounded to the defendant on direct examination, where the ruling in each instance was merely the customary ruling, "Objection sustained," and where the rulings were interspersed with six others overruling objections by the prosecutor. *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972). In the case *sub judice*, the trial judge during direct examination by the defense, twice instructed counsel not to lead the witness. On two other occasions the judge responded to the prosecution's objections as follows: "Sustained to leading" or "Sustained." It is inconceivable that these rulings on the evidence prejudiced defendant's case in the eyes of the jury.

Other exceptions noted under this question refer to the following alleged prejudicial comments made by the judge. During the trial, defense counsel objected to a question asked of Cannon, since it had "been asked three times." The court responded, "He answered twice. I will let him answer one more time." Defense counsel later objected when Cannon began to relate the conversation he had with defendant immediately prior to the alleged assault. The court responded, "Let him tell what he talked about, you have been over it." In another instance the court sustained a question asked by defense counsel and noted, "We have been over that." We emphasize that a trial judge's allowance or disallowance of alleged repetitive questions is within his discretion, and that this Court will not interfere with the exercise of his duty to control the conduct and course of a trial absent a showing of manifest abuse. No such abuse was shown by these comments. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Furthermore an examination of the record reveals that the trial judge did not consistently overrule objections to the State's leading questions while sustaining similar questions propounded by the defense.

State v. Lednum

The remaining two exceptions noted under this question are neither prejudicial nor erroneous. First, when Cannon testified that defendant punctured his lung, defense counsel objected and moved to strike. The court responded, "Don't consider, members of the jury, that his lung was punctured." Here the trial judge was merely repeating the testimony that he did not want the jury to consider. During the presentation of defendant's evidence, the prosecution objected to the following question: "State whether or not they [defendant and Cannon] were in-between the two parked cars?" The court responded, "Let him describe where they were." This comment by the court could only have been prejudicial to the State.

[2] In his second question defendant argues that the trial judge erred when he instructed the jury that a knife is a deadly weapon, since this matter was a question for the jury. The evidence for the State tended to show that on 19 February 1980 Cannon called the defendant at work and told defendant he wanted to talk to him about an alleged affair defendant was having with Cannon's wife. When Cannon later arrived at defendant's office, defendant suggested that they go outside. As he was talking to defendant, Cannon noticed a knife in defendant's hand. Defendant started coming towards him and Cannon hit him. Cannon was stabbed in the stomach, chest and face. As a result of his injuries he was hospitalized for a week; a tube was inserted in his lung; he received glucose and stitches and he was out of work for a month. Cannon then gave testimony of his medical bills. Cannon described the knife with which he was allegedly assaulted as a kitchen knife. Defendant later described the knife as a small paring knife. Defendant suggests to this Court that the description of the knife does not support the trial court's instruction that the knife was a deadly weapon per se. We disagree. In *State v. Roper*, 39 N.C. App. 256, 249 S.E. 2d 870 (1978), this Court held that a description of a knife as "a keen bladed pocketknife" was sufficient to require the trial court to find that the knife was a deadly weapon per se. In *Roper* we indicated that the actual effects produced by the weapon may also be considered in determining whether it is deadly. In the present case the evidence of the victim's (Cannon's) injuries, hospitalization, treatment and absence from work clearly showed that Cannon suffered serious injuries. Defendant has shown no error by this argument.

State v. Lednum

[3] Defendant next argues that he was prejudiced when the court allowed Cannon to testify that defendant was having an affair with Cannon's wife. He now emphasizes that this evidence had no bearing on the issue before the court, and that its sole effect was to prejudice him in the eyes of the jury. We disagree on the basis that the evidence was relevant to show the state of mind of Cannon. Even if this evidence were deemed irrelevant, defendant has not carried his burden of showing that the evidence was so prejudicial that had it not been for the admission of the irrelevant evidence a different result would have ensued. *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979). Furthermore, in his charge, the judge instructed:

There has been some evidence on behalf of the State that tends to show that the defendant was having an affair with Randy Cannon's wife. You shall not consider any evidence about an affair as bearing on the guilt or innocence of this defendant. Again, he is not charged with having an affair with anybody. That evidence offered by the State was offered for the purpose of showing the state of mind of the witness Randy Cannon at the time this took place, and has no bearing whatever on the guilt or innocence of this defendant.

This instruction erased any possible prejudicial effect.

In defendant's final question presented he argues that the court erred in excluding evidence on three occasions. On the first occasion a witness for the defense testified that defendant and his family stayed in her house for two weeks after the alleged assault. The trial court refused to allow the witness to testify as to the reason defendant and his family stayed with her. Defendant argues that this evidence was relevant to establish defendant's fear of Cannon on 19 February 1980, particularly since defendant had testified at trial that he assaulted Cannon in self-defense. We cannot sustain defendant's exception to the exclusion of this evidence, since the record on appeal failed to show what the witness would have testified had she been permitted to answer. *State v. Lee*, 33 N.C. App. 162, 234 S.E. 2d 482 (1977).

The remaining alleged erroneous exclusions of evidence discussed in this question concern the court's failure to admit certain exhibits into evidence. Defendant first argues that the

State v. Lednum

court erred in failing to admit into evidence exhibits consisting of 1979 and 1980 rental agreements between defendant and Cannon and a \$210 check drawn to Cannon by defendant for alleged reimbursement of rent and deposit. He argues that these exhibits were necessary to rebut the “insinuation” that the \$210 check was presented to Cannon by the defendant as payment for a tape of a conversation between defendant and Cannon’s wife concerning the alleged affair. A reading of the record reveals this argument to be meritless. First, the court did allow the \$210 check into evidence. Second, defendant testified without objection that the amount of this check constituted reimbursement to Cannon of his \$160 rental payment and \$50 deposit. Clearly no prejudice has been shown. Finally, defendant argues that the trial court erred in sustaining the State’s objection to the introduction into evidence of a knife and a block for the knife allegedly owned by defendant. Thereafter defendant testified that on the morning of the alleged assault he removed the smaller knife from the block before leaving for work because of the threats he had received from Cannon. Defendant now argues that the jury was denied an opportunity to determine “defendant’s intent in arming himself” when they were not allowed to see the larger knife and block. We also find this argument to be meritless.

We have carefully considered the defendant’s remaining assignments of error and find them to be without merit.

We hold that defendant had a fair trial free from prejudicial error.

No error.

Judges WEBB and HILL concur.

Campbell v. Church

GEORGE HARVEY CAMPBELL, INDIVIDUALLY AND AS REPRESENTATIVE OF THE CITIZENS AND TAXPAYERS OF DURHAM, NORTH CAROLINA v. FIRST BAPTIST CHURCH OF THE CITY OF DURHAM, AN UNINCORPORATED ASSOCIATION; CITY OF DURHAM; REDEVELOPMENT COMMISSION OF THE CITY OF DURHAM; and the UNITED STATES OF AMERICA, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JAMES T. LYNN, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

No. 8014SC778

(Filed 7 April 1981)

Municipal Corporations § 4.5— exchange of property between redevelopment commission and church — effect of prior appellate decisions

Prior appellate court decisions rendered void the entire exchange of real property between a municipal redevelopment commission and a church, including a conveyance of property by the church to the redevelopment commission as well as a conveyance by the redevelopment commission to the church.

APPEAL by defendant City of Durham from *Battle, Judge*. Judgment entered 3 April 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 March 1981.

This case arises out of an exchange of real property made in connection with an urban renewal project. On 19 January 1973 defendant First Baptist Church conveyed to defendant Redevelopment Commission a parcel of land referred to as the "Church tract." On the same day, the Redevelopment Commission conveyed to the church a parcel called the "Markham tract," and paid \$1,885.17 in cash for the difference in value. The City of Durham now acts as successor to the Redevelopment Commission.

In February 1973, plaintiff brought suit attacking the exchange, in two causes of action, of which only the first is relevant to this appeal. Plaintiff alleged that the exchange did not comply with statutory procedures under N.C.G.S. 160-464 (now N.C.G.S. 160A-514) and sought relief including the following: "[that] (a) The court declare the exchange illegal, *ultra vires* and void; (b) The court cancel and rescind the deeds and other instruments between the defendant Commission and defendant Church effectuating such exchange."

Upon trial on the merits, the trial court concluded that the conveyances were lawful and that each deed gave the respec-

Campbell v. Church

tive party good and valid title to the tract described. This Court reversed on that issue, and remanded the case to the superior court because of the Redevelopment Commission's failure to follow statutory procedures, and the Supreme Court of North Carolina affirmed. *Campbell v. Church*, 39 N.C. App. 117, 250 S.E. 2d 68 (1978), *aff'd*, 298 N.C. 476, 259 S.E. 2d 558 (1979). These opinions set out the factual background in detail.

Upon remand, the superior court entered judgment declaring both deeds void and ordering the church to repay \$1,885.17, with interest. Defendant City of Durham appeals.

W.I. Thornton, Jr. and Daniel K. Edwards for defendant appellant, City of Durham.

Haywood, Denny & Miller, by Egbert L. Haywood and David M. Lomas, for defendant appellee, First Baptist Church.

MARTIN (Harry C.), Judge.

Appellant properly brings forward only one assignment of error. The sole question on this appeal is whether the trial court erred in declaring void the conveyance of the Church tract from the Church to the Redevelopment Commission. At the hearing, the parties stipulated that the deed to the Markham tract should be declared void, but disputed the validity of the deed to the Church tract. In its brief, appellant argues that "[t]he decisions and opinions of the appellate Courts did not themselves invalidate the conveyance of the Church tract . . . either directly or by necessary implication."

The parties agree that the mandate of an appellate court is binding on the trial court, which must strictly adhere to its holdings. N.C. Gen. Stat. 1-298; *D. & W., Inc. v. Charlotte*, 268 N.C. 720, 152 S.E. 2d 199 (1966). Appellant argues that the trial court misperceived our opinion and the Supreme Court's affirmance thereof, contending that only the deed to the Markham tract was to be declared void. The issue, then, is the proper interpretation of our decision in the previous appeal, that is, whether the entire exchange, or merely the deed to the Markham tract, was held to be void.

Expressions contained in an appellate court decision must be interpreted in the context of the factual situation under review, or the framework of the particular case. *Insurance Co.*

Campbell v. Church

v. Insurance Co., 279 N.C. 240, 182 S.E. 2d 571 (1971); *Insurance Co. v. Insurance Co.*, 276 N.C. 243, 172 S.E. 2d 55 (1970); *Collins v. Simms*, 257 N.C. 1, 125 S.E. 2d 298 (1962).

Here, plaintiff originally and expressly sought to have the entire transaction — the “exchange” — declared void. Defendants resisted on the grounds that an exchange should not be subject to the statutory procedures governing sales by the Redevelopment Commission under N.C.G.S. 160-464 (now N.C.G.S. 160A-514). Until the action was remanded, none of the parties ever regarded the exchange as other than a single transaction or occurrence. To “exchange” has been defined as “[t]o part with, give, or transfer for an equivalent.” Black’s Law Dictionary 671 (4th ed. rev. 1968). In an exchange, specific property is given in consideration of property other than money, although one of the parties may pay a sum of money in addition to the property. *Id.* In our decision on the earlier appeal, Judge Hedrick stated:

We hold that the “exchange” of property between a redevelopment commission and a “redeveloper” such as the First Baptist Church in this case, is nothing more than a “private sale” of real property . . . and that such *exchange* must be in compliance with all of the requirements of G.S. § 160-464(e)(4).

39 N.C. App. at 128-29, 250 S.E. 2d at 74 (emphasis added). This Court further held that because the statutory procedures had not been followed in conveying the Markham tract, that deed was void *ab initio*, and concluded:

We hold that the trial court erred in concluding that the *exchange* of property between the Redevelopment Commission and the First Baptist Church “were lawful conveyances” and that “the First Baptist Church, in any event, was a bona fide purchaser; and the provisions of G.S. 160A-522 are applicable.”

With respect to plaintiff’s first cause of action, the judgment is reversed and the cause is remanded to the Superior Court of Durham County for further proceedings not inconsistent with this opinion.

39 N.C. App. at 130, 250 S.E. 2d at 75 (emphasis added).

Campbell v. Church

In affirming our decision, the Supreme Court initially noted that plaintiff “instituted this action seeking to set aside an *exchange* of real property.” 298 N.C. at 476, 259 S.E. 2d at 559 (emphasis added). It further noted that plaintiff sought “to void the *deeds* on grounds that the *exchange* did not comport with the statutory requirements governing transfers of land by the Redevelopment Commission.” 298 N.C. at 477, 259 S.E. 2d at 560 (emphasis added). It held that the Redevelopment Commission did not comply with the applicable statutes, under which “a private ‘exchange’ is no different from a private ‘sale’ in terms of its nature and effect.” 298 at 484, 259 S.E. 2d at 564.

Thus, while declaring the conveyance of the Markham tract void from its inception, this Court reversed the trial court’s conclusion that the exchange, involving two conveyances, was valid. A reversal by an appellate court is a directive to the trial court to reverse its ruling. *Teague v. Oil Co.*, 232 N.C. 469, 61 S.E. 2d 345 (1950). The holding that the Markham tract deed was void *ab initio* resulted in the necessity of declaring the entire exchange void. To hold otherwise would work an injustice, as the consideration given for the Church tract was not merely money but included a specific and unique piece of property. The conveyance of the Markham property to the Church was an integral part of its agreement to convey the Church property. Where an instrument is set aside, the object of the law is to restore the parties to their original positions. *Gilbert v. West*, 211 N.C. 465, 190 S.E. 727 (1937). The grantee is entitled to recover its consideration, including its property if possible. See *Smith v. Smith*, 261 N.C. 278, 134 S.E. 2d 331 (1964); *Childress v. Trading Post*, 247 N.C. 150, 100 S.E. 2d 391 (1957).

We hold that Judge Battle’s judgment on remand was consistent with the earlier appellate court decisions.

Affirmed.

Judges CLARK and ARNOLD concur.

State v. Williams

STATE OF NORTH CAROLINA v. BERNARD LEVERNE WILLIAMS

No. 8014SC677

(Filed 7 April 1981)

Rape § 6.1— second degree rape charged – instruction on assault with intent to commit rape required

In a prosecution for second degree rape based on allegations that defendant aided and abetted a co-defendant in the commission of a rape, the trial court erred in failing to instruct the jury on the lesser included offense of assault with intent to commit rape where substantial evidence, including testimony by a State's witness, was presented at trial tending to show that defendant was not present at the time of penetration.

APPEAL by defendant from *Godwin, Judge*. Judgment entered 13 February 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 January 1981.

Defendant was charged in a proper bill of indictment with the felony of a Second Degree Rape based on allegations that he aided and abetted a co-defendant in the commission of a rape.

The State's evidence tended to show that defendant, Bernard Williams, and co-defendant, Michael McRae, were visiting friends in Eagleson Dormitory (a women's dormitory) on the campus of North Carolina Central University shortly after midnight on 11 May 1979. While in the dormitory, Williams and McRae went to Room 308 to see a friend, Gloria Pate. They entered Ms. Pate's room and found the prosecuting witness, Gladys Adams, asleep on one of the beds.

According to Ms. Adams, she awoke when she felt pressure on the bottom half of her body. Once awake, she discovered that her pants and underpants had been removed; that McRae was sitting on top of her; and that Williams was holding her hands over her head. Ms. Adams testified that McRae then forcibly and against her will had intercourse with her while Williams held her arms.

After approximately twenty minutes there was a knock on the door. McRae immediately put on his clothes; Williams released Ms. Adams' hands; and Ms. Adams put on her clothes. Patrina Tollison (Ms. Adams' roommate from across the hall) then entered the room, picked up a soda and a piece of cake and left the room without speaking. Shortly thereafter, Gloria Pate, who had earlier studied with Ms. Adams, returned to her room.

State v. Williams

After her arrival, Williams and McRae left. Williams and McRae were arrested at approximately 6:30 a.m. on 11 May 1979.

Defendant's evidence tended to show that Williams and McRae went to visit friends in Eagleson Dormitory at about 12:30 a.m. on 11 May 1979. While on the third floor, they stopped at the open doorway of Gloria Pate's room. They entered the room and found Gladys Adams asleep on the bed. Williams testified that he shook Ms. Adams by the arms to wake her up and say hello. He then told McRae and Ms. Adams that he was going upstairs to visit his girlfriend, and he left the room.

McRae testified that after he and Williams entered the room, they began caressing Ms. Adams' legs until she woke up. After she woke up, Williams left the room. McRae then talked with Ms. Adams and she consented to have sex with him. After McRae and Ms. Adams had intercourse and had dressed, Pattrina Tollison came into the room, picked up a soda, and left. Williams then returned to pick up McRae. Gloria Pate came into the room shortly thereafter, and Williams and McRae left.

The State's witness Pattrina Tollison also testified on cross-examination that when she entered the room to pick up her soda and cake, McRae and Ms. Adams were the only two people in the room. Upon leaving the room, she saw Williams walking down the hall, and talked with him for a few moments. She then saw him go into the room where McRae and Ms. Adams were.

In a consolidated trial, the jury found both the defendant and McRae guilty of second degree rape, and each was later sentenced to 40 years in prison. Defendant Williams appealed.

Attorney General Edmisten, by Associate Attorneys Richard L. Kucharski and Tom Ziko, for the State.

Loflin and Loflin, by Thomas F. Loflin, III, for defendant appellant.

BECTON, Judge.

In his appeal, defendant Williams makes thirteen (13) assignments of error. In his ninth assignment, he argues that the trial court erred in failing to instruct the jury on the lesser included offense of assault with intent to commit rape.

State v. Williams

It is well established in North Carolina that:

When a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment.

State v. Riera, 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970); *State v. Cloninger*, 37 N.C. App. 22, 25, 245 S.E. 2d 192, 194-95 (1978); G.S. 15-170. This Court and the North Carolina Supreme Court have held further that when there is some evidence to support the included offense, the defendant is entitled as a matter of law to have the jury instructed on the lesser offense. *State v. Riera, supra*; *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Jones*, 36 N.C. App. 447, 244 S.E. 2d 709 (1978). "The presence of such evidence is the determinative factor." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954); *State v. Williams, supra*. If the defendant is entitled to an instruction on the lesser offense, based on the presence of such evidence, it is of no legal significance that defendant's counsel did not make a specific request for the instruction nor that the defendant was subsequently convicted of the greater offense. *State v. Riera, supra*; *State v. Jones, supra*.

Second degree rape occurs when one unlawfully, wilfully, and feloniously ravishes and carnally knows a female by force and against her will. Actual penetration of the female sexual organ by the male sexual organ is an essential element of the offense. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977); *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973). A defendant may also be convicted of second degree rape upon proof that he was present at the time of penetration and aided and abetted a co-defendant in the commission of the act. *State v. Primus*, 226 N.C. 671, 40 S.E. 2d 113 (1946). Assault with intent to commit rape, however, has been held to be a lesser included offense of second degree rape, *State v. Green*, 246 N.C. 717, 719, 100 S.E. 2d 52, 54 (1957), and is defined as an assault on a woman with the intent to gratify one's passion notwithstanding any resistance on her part. *State v. Pearce*, 296 N.C. 281, 293, 250 S.E. 2d 640, 648-49 (1979).

State v. Williams

In this case, defendant Williams contends that substantial evidence was presented at trial tending to show that he was not present at the time of penetration and therefore was entitled to an instruction on the lesser offense of assault with intent to commit rape. Based on the evidence in the record, this court agrees.

It is undisputed that Williams did not have sexual intercourse with the prosecutrix. Additionally, Williams and McRae both testified that shortly after entering and waking Ms. Adams, Williams left the room. Williams testified:

When I saw Gladys laying [sic] in the bed there, I shook her arm and woke her up. I said hi—how are you doing. She did not make any response to me. I told her, you know, I was going to my girlfriend's room.

I left and Mike and Gladys were the only people in the room as I left. . . .

Co-defendant McRae testified:

Gladys was on the bed, and Bernard and I started caressing her legs. Then she woke up. Then Bernard left. . . .

It was a matter of minutes after we entered the room before Bernard left. He left immediately after she awakened. . . .

McRae then testified that the act of sexual intercourse with Ms. Adams took place after Williams left the room.

It is true that Ms. Adams testified that Williams was in the room during the time the rape took place and was present when Pattrina Tollison entered the room just after the rape occurred. Tollison, testifying for the State, however, contradicted Ms. Adams on direct and cross-examination. Tollison said that when she entered the room, McRae and Ms. Adams were the only ones present. In light of the testimony tending to show that Williams was not present when intercourse took place and corroborated by one of the State's own witnesses, sufficient evidence was presented to support the submission of the lesser offense of assault with intent to commit rape to the jury.

The State argues that assault with intent to commit rape requires a showing that the defendant assaulted Ms. Adams

State v. Williams

with a desire to gratify his sexual passion *notwithstanding any resistance* she might make. The State points out that a key aspect of Williams' defense at trial was that if he did assault Ms. Adams, he desisted immediately upon realizing that she would resist his advances. Therefore, the State argues, Williams cannot now claim that he had the intent to commit a rape notwithstanding any resistance by Ms. Adams. Without evidence of this essential element of assault with intent to commit rape, the State contends that the defendant was not entitled to an instruction on the lesser offense.

The State, however, presented evidence at trial designed to establish that Williams in fact did have the requisite intent to commit rape notwithstanding any resistance by Ms. Adams. Evidence was elicited on examination by the district attorney suggesting that Williams and McRae went into the room in which Ms. Adams was sleeping to have sex with her based on a bet between the two of them. Further, Ms. Adams testified that Williams held her arms before McRae raped her. The record indicates that Ms. Adams tried to get up ("I struggled to get my hands aloose and I tried to draw my legs together."); that McRae had to force her legs apart while Williams had her arms and hands "grabbed and cuffed together" over her head; and that she kept calling for Gloria Pate after McRae told her not to fight, not to holler, and not to call for Gloria.

On cross examination, McRae testified that he "removed her pants while Bernard [Williams] *held her arms down*. Bernard wanted to go first, but we decided I would go first." (Emphasis added.) Additionally, one of the investigating officers testified that McRae told him that: "Upon entering the room, *they* did close the door and cut the lights off and begin shaking her and removing her clothes." (Emphasis added.) Because jurors may believe all, or any part, or none of what a witness has said on the stand, this testimony constitutes some evidence — direct and inferential — that Williams had the intent to commit rape notwithstanding any resistance on the part of Ms. Adams. This evidence of intent to commit rape notwithstanding any resistance on Ms. Adams' part, other evidence that Williams left at some point prior to carrying out his intent and evidence that Williams was not present when sexual intercourse occurred, is sufficient to support a finding by the jury that Williams was only guilty of assault with intent to commit rape. Therefore,

Mayo v. City of Washington

Williams was entitled to have an instruction on the lesser offense.

We find no need to address defendant's other assignments of error because those alleged errors are not likely to reoccur in a second trial. The trial court failed to instruct the jury on the lesser included offense of assault with intent to commit rape, and as a result, the defendant is entitled to a

New Trial.

Chief Judge MORRIS and Judge VAUGHN concur.

ROY LAVERN MAYO v. CITY OF WASHINGTON

No. 8010IC812

(Filed 7 April 1981)

1. Master and Servant § 96.5—workers' compensation—sufficiency of evidence to support findings

The evidence in a workers' compensation hearing supported findings by the Industrial Commission that plaintiff policeman injured his knee on 29 November 1977 by accident arising out of and in the course of his employment and that injuries to plaintiff's right knee on 25 December 1977 and 3 January 1978 were the direct and natural results of the injury to the knee on 29 November 1977.

2. Master and Servant § 72—workers' compensation—permanent partial disability

An award of compensation for a ten percent permanent partial disability of plaintiff's right knee was supported by medical reports which were introduced into evidence.

APPEAL by defendant from an order and award of the North Carolina Industrial Commission filed 20 May 1980. Heard in the Court of Appeals 11 March 1981.

Plaintiff instituted this proceeding seeking compensation for injury to his right knee allegedly sustained while working as a police officer for the defendant, the City of Washington, North Carolina. The parties stipulated that the provisions of the Workers' Compensation Act controlled the action, that an employer-employee relationship existed between the parties, that the plaintiff's average weekly wage was \$159.39 and that medical

Mayo v. City of Washington

reports marked as Exhibits One through Ten were to be entered into the record. After a hearing, Deputy Commissioner John Charles Rush made findings of fact which provided, in pertinent part, as follows:

3. Sometime in June, 1976, the plaintiff was participating in a softball game as a member of the Beaufort County Law Enforcement team. During the game the plaintiff felt a pop in his right knee as he was running from first base to second base.

4. The plaintiff did not have any further difficulty with his right knee until about early December 1976. Sometime in about early December, 1976, the plaintiff's right knee began to lock. Dr. S.L. Crisp, an orthopedic surgeon, operated on the plaintiff's knee for a tear of the right medial meniscus in December 1976. The plaintiff made a satisfactory recovery from the operation.

. . .

7. On November 29, 1977, the plaintiff was on a routine patrol as a police officer for the defendant employer. Sometime in the evening he responded to a radio dispatch call by driving the police car to the designated location of a stolen truck. Upon arriving at the location he saw the stolen truck and began to follow it. The truck came to an abrupt stop behind a department store in a shopping center. The driver of the truck and a passenger in the truck jumped from the truck and ran. The plaintiff stopped the police car and ran across the parking lot and into the department store after the passenger. While running after the passenger in the department store the plaintiff caught his right foot under a counter which caused his right knee to snap. The plaintiff managed to apprehend the passenger in the department store.

8. The plaintiff received treatment for his right knee condition at the emergency room of the local hospital immediately after he apprehended the passenger in the truck. He reported the injury to the defendant employer on November 30, 1977, and continued his work with the defendant employer on a regular basis.

Mayo v. City of Washington

9. The plaintiff had no difficulty with his right knee from the time Dr. S.L. Crisp discharged him after the December 1976 operation until he caught his right foot under the counter on November 29, 1977.

10. On December 25, 1977, the plaintiff was on a routine patrol as a police officer for the defendant employer. Sometime during that work shift the plaintiff parked the police car and got out by opening the left front car door. When the plaintiff turned to close the car door his right knee locked. Another police officer transported the plaintiff to the emergency room of the local hospital.

11. The plaintiff saw Dr. Paul Horton at the emergency room on December 25, 1977 and told the doctor that he injured his right knee on the job about a month prior to December 25, 1977 and reinjured his right knee on December 25, 1977 when he stepped wrong and twisted it. He also told Dr. Horton that he had a medial meniscectomy on some prior occasion. Dr. Horton felt the plaintiff had an internal derangement of the right knee and referred him to Dr. Albert Dow and/or Dr. S.L. Crisp.

. . .

13. On January 3, 1978, the plaintiff was performing paper work duties as a police officer for the defendant employer. While the plaintiff was in the office his right knee locked when he turned to get some papers from his desk.

14. The plaintiff saw Dr. S.L. Crisp on January 4, 1978. Dr. Crisp described the plaintiff's condition as a recurrent locking of the right knee and concluded the plaintiff had a tear of the regrowth of the medial meniscus. The doctor admitted the plaintiff to the hospital on February 8, 1978 and performed [sic] a right medial meniscectomy on February 9, 1978. After Dr. Crisp discharged the plaintiff from the hospital on February 12, 1978, he followed the plaintiff in his medical office periodically through April 18, 1978. Dr. Crisp felt the plaintiff could return to work on April 20, 1978.

15. In the opinion of Dr. S.L. Crisp, the plaintiff had a satisfactory recovery from the December 1976 right knee operation. Dr. Crisp felt the plaintiff's right knee had sub-

Mayo v. City of Washington

stantially or completely recovered from the December 1976 operation prior to the second knee injury and that the second knee injury was a new injury.

16. Dr. S.L. Crisp did not think the plaintiff's right leg would hinder him in performing the duties of a police officer.

17. Dr. S.L. Crisp gave the plaintiff a 10% permanent partial disability rating of the right knee.

. . .

19. There was a showing of an interruption of the plaintiff's regular work routine on November 29, 1977. The plaintiff did in fact on that occasion sustain an injury by accident arising out of and in the course of his employment. Said injury by accident resulted in a new injury to the plaintiff's right knee.

20. The injuries to the plaintiff's right knee on December 25, 1977 and January 3, 1978, were the direct and natural result of the injury by accident on November 29, 1977.

. . .

22. The plaintiff sustained a 10% permanent partial disability of the right leg as a result of the injury by accident arising out of and in the course of his employment on November 29, 1977, and as a result of the subsequent injuries he sustained on December 25, 1977 and January 3, 1978.

Based on these findings of fact, Deputy Commissioner Rush concluded as a matter of law that plaintiff had sustained an injury by accident arising out of and in the course of his employment on 29 November 1977; that said injury had been a new injury to plaintiff's right knee; that the 25 December 1977 and 3 January 1978 injuries to plaintiff's right knee had been the direct and natural results of the injury by accident on 29 November 1977 and that plaintiff was entitled to compensation for a ten percent permanent partial disability of his right leg.

Defendant appealed. The Full Commission found that there was competent evidence of record to support in every aspect Deputy Commissioner Rush's opinion and award and adopted

Mayo v. City of Washington

and affirmed his opinion and award. From the opinion and award of the Full Commission, defendant appealed to this Court.

Carter, Archie, Grimes & Hassell by Samuel G. Grimes, for the plaintiff-appellee.

McMullan & Knott by Lee E. Knott, Jr., for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] Defendant first contends that the evidence in the record does not support the finding by the Commission that the injury for which the award was given resulted from an accident arising out of and in the course of the plaintiff's employment. The Workers' Compensation Act does not provide compensation for injury, but only for injury by accident. *Hargus v. Foods, Inc.*, 271 N.C. 369, 156 S.E. 2d 737 (1967). The defendant concedes in its brief that the evidence is sufficient to support a finding that the plaintiff injured his knee on 29 November 1977 by accident arising out of and in the course of his employment. The defendant argues, however, that the evidence is not sufficient to support a finding that the injuries to the plaintiff's right knee on 25 December 1977 and 3 January 1978 were the direct and natural results of the injury to the knee on 29 November 1977. We disagree.

The extent of the scope of review by this Court of an award of compensation by the Industrial Commission has often been defined by the courts of this State. It is aptly stated in *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E. 2d 389, 390-1 (1980) by Justice Exum, speaking for the Supreme Court, as follows:

It is not for a reviewing court, however, to *weigh* the evidence before the Industrial Commission in a workmen's compensation case. By authority of G.S. 97-86 the Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it. Its findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). Thus, if the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's find-

Mayo v. City of Washington

ings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968); *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963).

Examining the evidence before the Commission on the issue of whether the injury resulted from an accident arising out of the course of the plaintiff's employment, we hold that there was competent evidence in the record supporting the finding that "[t]he injuries to the plaintiff's right knee on December 25, 1977 and January 3, 1978, were the direct and natural result of the injury by accident on November 29, 1977." Dr. Horton, the physician who examined plaintiff after the 25 December 1977 accident, stated in Exhibit Two that plaintiff "[w]as injured on the job a month ago, was reinjured today." This was sufficient medical evidence to establish a causal connection between the 29 November accident and the subsequent injuries. In addition, plaintiff's testimony also links his subsequent injuries to the 29 November accident at work. Plaintiff testified that while pursuing a fleeing suspect in a department store on 29 November 1977, he "got [his] right foot underneath the counter . . . which caused the knee to snap backwards and it popped, something inside the knee itself." Plaintiff also testified that "[r]ight after the incident happened," he consulted a physician in a hospital emergency room. He further testified:

I had some problems with the same knee on Christmas Day of 1977. I just got out of the police car I was operating and turned to close the door; and when I turned to close the door, the knee locked. . . . I couldn't straighten it out. . . . I was not able to unlock my knee right then. I believe in a couple of days it unlocked itself. . . . I had another incident in January . . . on or about January 3. It was basically the same. I was in the office at this time and I just returned to — reached for some papers off my desk and when I turned, the knee locked again.

Plaintiff's injury was diagnosed as a tear of the right medial meniscus. The descriptions of the sensations plaintiff experienced supports the finding that the tear occurred on 29 November (the knee snapped backwards and popped, "something in the knee itself") and that the subsequent incidents resulted

State v. Vaughan

from that tear (“the knee locked,” “the knee locked again”). The fact that other evidence in the record does not support such a finding, and seems to contradict it, is of no consequence to this appeal, as the duty of this Court in reviewing the validity of the award on appeal is to ascertain whether there is *any* competent evidence in the record to support the finding. *Click v. Freight Carriers, supra*; *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 263 S.E. 2d 280, *rev. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980).

[2] Defendant also contends that there is insufficient evidence in the record to support the award of ten percent permanent partial disability to the plaintiff. Again, we are guided by the principles enunciated in *Click v. Freight Carriers, supra*. The record reveals that Dr. Crisp stated in Exhibits Five, Six and Seven that plaintiff had sustained a ten percent permanent partial disability as a result of his injury. As this constitutes competent medical evidence in the record to support the Commission’s finding that plaintiff sustained a ten percent permanent partial disability of his right leg, this finding is conclusive on appeal and cannot be set aside by this Court. *Id.*; *Gamble v. Borden, Inc., supra*.

We find, therefore, that the evidence was sufficient to support the Industrial Commission’s findings of fact and that these findings justify the Commission’s award. Therefore we affirm the award.

Affirmed.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. CHAUNCEY ROSCOE VAUGHAN,
DEFENDANT

No. 809SC1097

(Filed 7 April 1981)

Criminal Law § 91– 243 days between arrest and trial – denial of speedy trial

Defendant was entitled to have the charge against him dismissed on the ground that he was denied a speedy trial where defendant was arrested on 16 May 1979 and was first brought to trial on 14 January 1980; the burden upon the State was to show not just that a limited number of terms of court were

State v. Vaughan

available to try defendant, but that due to such limited number of terms of court, the time limitation of the Speedy Trial Act could not reasonably be met; and the State did not meet its burden of showing why defendant's case could not reasonably have been reached and tried at the August, September, October and November terms of court which took place before 3 December 1979 when defendant filed his motion for speedy trial. G.S. 15A-701(b).

APPEAL by defendant from *Hobgood, Judge*. Judgment entered 1 July 1980 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 12 March 1981.

Defendant was charged in a proper indictment with armed robbery, was tried and convicted, and was sentenced to a term of imprisonment. From this judgment, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Christopher P. Brewer, for the State.

Davis, Sturges & Tomlinson, by Aubrey S. Tomlinson, Jr., for defendant appellant.

WELLS, Judge.

Defendant has brought forward numerous assignments of error relating to his trial below. In one of his assignments, defendant contends that the trial court erred in not granting his motion to dismiss the charge against him on the grounds that defendant was denied a speedy trial.

On 23 April 1979, defendant was indicted for the armed robbery of William Attaway Eaton and Willis Pearce Weathers on 14 May 1978. Defendant was arrested on 16 May 1979. On 3 December 1979, defendant filed *pro se* a written motion for a speedy trial, or for dismissal of the charges against him. Defendant was brought to trial on 14 January 1980. The trial record does not reflect any action on defendant's 3 December 1979 motion prior to the 14 January 1980 trial. That trial resulted in a mistrial. Defendant was again brought to trial on 21 April 1980. The record does not reflect any action on defendant's 3 December 1979 motion prior to the 21 April 1980 trial. That trial resulted in a mistrial on 23 April 1980, at which time defendant renewed his motion for a speedy trial, requesting that his case be set for trial at the next Criminal Session of Franklin County Superior Court, which began the following Monday. The trial judge declined to act on the motion. As of 30 May 1980, defendant's case had not been tried or scheduled for

State v. Vaughan

trial, and on that date defendant filed another written motion seeking to have the charge against him dismissed on the grounds of having been denied a speedy trial. Defendant was brought to trial again on 30 June 1980, at which time the trial court denied his motion to dismiss for failure of the State to give him a speedy trial.

Defendant contends that pursuant to the provisions of G.S. 15A-701, he is entitled to have the charges against him dismissed. The applicable statute, G.S. 15A-701 (al) (Supp. 1979), provides in pertinent part:

[T]he trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1980, shall begin within the time limits specified below:

- (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last;

. . . .

Two hundred and forty-three days elapsed between the time defendant was arrested on 16 May 1979 — the last occurring event under G.S. 15A-701 (al) — and the date defendant was first brought to trial on 14 January 1980.

G.S. 15A-701(b) sets out a number of grounds upon which periods of time may be excluded from computing the time within which the trial of a criminal offense must begin. Subsection (8) provides that:

Any period of delay occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met.

G.S. 15A-703 provides in pertinent part as follows:

If a defendant is not brought to trial within the time limits required by G.S. 15A-701 or within the time prescribed by the judge in his order for prompt trial under G.S. 15A-702(b), the charge shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of sup-

State v. Vaughan

porting that motion but the State shall have the burden of going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations under this Article have been complied with. . . .

At the time defendant's motion for speedy trial was heard and disposed of, on 30 June 1980, defendant met his burden by filing an affidavit setting forth the events and dates, sufficient to support his motion. The record does not disclose, however, that the State met its burden of showing that any of the time elapsing between the date of arrest and date of initial trial should have been excluded. In denying defendant's motion, the trial court made the following pertinent findings of fact:

1. That the defendant was indicted on the charge of armed robbery on the 23rd day of April, 1979, which said indictment was served on the defendant on the 16th day of May, 1979.

2. That the defendant moved to dismiss, pursuant to Section 15A-701 on December 13, 1979.

3. That the defendant was tried at the January 16, 1980, term of Superior Court in Franklin County, said trial having ended in a mistrial due to mis-statement by a witness for the State in violation of an Order of the Court.

4. That the defendant was again placed on trial at the April, 1980, term of the Superior Court in Franklin County, at which time there was a mistrial declared, based on the impossibility of the jurors in reaching a verdict.

5. That there are less than twenty sessions of Criminal Superior Court scheduled in Franklin County, and Franklin County falls within the purview of the 15A-702 of the General Statutes of North Carolina.

. . . .

The trial court then entered the following conclusion of law:

1. That the defendant's motion for a dismissal pursuant to Section 15A-701 of the General Statutes of North Carolina should be denied in that Franklin County falls within the purview of Section 15A-702 of the General Statutes of

State v. Vaughan

North Carolina concerning counties with limited Court sessions.

Apparently, the district attorney argued to the trial court that Franklin County was *exempt* from the provisions of the speedy trial statute due to the limited number of terms of court scheduled there. Such a position, if used by the State, is obviously erroneous. No county is *exempt* from the Act.

The State contends before this Court that the trial court in denying defendant's motion could take judicial notice of the limited number of terms of court in Franklin County and that the taking of such notice is sufficient to support its order denying defendant's motion. We must reject this argument. The State's burden under the facts of this case was to show not just that a "limited" number of terms of court were available to try defendant, but that due to such limited number of terms of court, the time limitation of the statute could not *reasonably* be met. We take judicial notice that there were criminal terms of Superior Court held in Franklin County in August, September, October and November of 1979. The State has not met its burden of showing why defendant's case could not reasonably have been reached and tried at the 20 August 1979 term, within 120 days, or for that matter, at any of the other terms ensuing between that term and 3 December 1979 when defendant filed his motion. For the State's failure to meet its burden, the charge against defendant must be dismissed. *See State v. Edwards*, 49 N.C. App. 426, 271 S.E. 2d 533 (1980).

The judgment entered against defendant in the court below must be vacated and the case remanded to the Superior Court of Franklin County for entry of an order granting defendant's motion to dismiss for failure to comply with the Speedy Trial Act. In determining whether such order should be entered with or without prejudice, the trial court should consider the factors set forth in G.S. 15A-703.

In another assignment of error, defendant contends that he has twice been put in jeopardy for the same offense, in violation of the provisions of Article I of the North Carolina Constitution and the provisions of the Fifth Amendment to the United States Constitution, asserting that jeopardy attached in his April 1980 trial when the trial judge declared a mistrial over his objection. At that trial, the record discloses that about one hour

State v. Brunson

and forty minutes after beginning its deliberations, the jury returned to the courtroom, where the foreman informed the trial judge that the jury was unable to agree on a verdict. The foreman indicated that on their first vote they had split three and nine and that on their last vote they were split seven and five. The trial judge then inquired of the foreman whether in the foreman's opinion the jury could reach a unanimous verdict if they deliberated another hour or so. When the foreman responded in the negative, the trial judge declared a mistrial. It is settled law in this State that after a jury has declared its inability to reach a verdict, the action of the trial judge in declaring a mistrial is reviewable only in case of gross abuse of discretion, the burden being upon the defendant to show such abuse. *State v. Alston*, 294 N.C. 577, 584, 243 S.E. 2d 354, 359 (1978); *State v. Johnson*, 41 N.C. App. 423, 427, 255 S.E. 2d 275, 278 (1979). Defendant has clearly failed to carry that burden in this case, and this assignment is overruled.

We have carefully examined defendant's other assignments of error and find them to be without merit.

The judgment below is vacated and this case will be remanded to the Superior Court of Franklin County for proceedings consistent with this opinion.

Vacated and remanded.

Judges VAUGHN and BECTON concur.

STATE OF NORTH CAROLINA v. THOMAS BRUNSON, JR.

No. 8014SC1010

(Filed 7 April 1981)

1. Indictment and Warrant § 15– motion to dismiss indictment – timeliness

Defendant's motion to dismiss the indictment on the ground that it failed to charge a crime was timely although it was not made until the close of the evidence. G.S. 15A-952(d); G.S. 15A-954(a) and (c).

2. Receiving Stolen Goods § 2– receiving stolen credit card – indictment

When a defendant is charged with a violation of the receiving portion of the financial transaction card theft statute, G.S. 14-113.9(a)(1), it must be alleged that he received a card from a third party who also intended to use it.

State v. Brunson

APPEAL by defendant from *Battle, Judge*. Judgment entered 12 June 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 March 1981.

Defendant was tried for financial transaction card theft. The jury convicted him of the charge, and the trial court sentenced him to imprisonment. Defendant appeals.

Attorney General Edmisten, by Associate Attorney General Steven F. Bryant, for the State.

Gary K. Berman for defendant appellant.

MARTIN (Harry C.), Judge.

The indictment upon which defendant was tried reads, in pertinent part, as follows:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 23rd day of February, 1980, in Durham County Thomas Brunson, Jr. unlawfully and wilfully did feloniously receive an Exxon credit card issued to J.V. Turner, bearing card number 366-837-797-5, with an expiration date of 04-80, and issued by Exxon Corporation. The defendant was not entitled to this card and he intended to use it. At the time of receiving the credit card, the defendant knew that a person had unlawfully, wilfully, and feloniously taken, obtained, and withheld the credit card from the person, possession, custody, and control of J.V. Turner without [the] consent of J.V. Turner.

At the close of evidence, defendant moved to dismiss the indictment on grounds that it failed to charge a crime. The motion was denied and this ruling is the subject of defendant's first assignment of error. We sustain the assignment.

[1] Initially, we note that defendant's motion to dismiss was timely, although it was not made until the close of evidence. N.C.G.S. 15A-952(d) provides: "Motions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time." Further, N.C.G.S. 15A-954(a) provides: "The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that: . . . (10) The pleading fails to charge an offense as provided in G.S. 15A-924(e)." Subsection (c) of this statute provides: "A motion

State v. Brunson

to dismiss for the reasons set out in subsection (a) may be made at any time." We now turn to the merits of the motion.

[2] Financial transaction card theft is defined by N.C.G.S. 14-113.9(a). We are here concerned with subsection (a) (1) of the statute. Our Supreme Court examined this subsection in *State v. Springer*, 283 N.C. 627, 197 S.E. 2d 530 (1973). Justice Huskins wrote:

Defendant is charged with unlawfully, willfully and feloniously withholding a credit card from Mabel L. Long, the cardholder, in violation of G.S. 14-113.9(a)(1). That subsection reads as follows:

"§ 14.113.9. *Credit card theft*. — (a) A person is guilty of credit card theft when:

- (1) He takes, obtains or withholds a credit card from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder."

Acts dealing with credit card crimes have been enacted in nearly all states in recent years. In defining credit card theft, the majority of these acts have been drafted with much greater clarity than ours. Georgia and Virginia have followed our statute almost verbatim. See Georgia Code Ann. § 26-1705.2 (1972); Virginia Code Ann. § 18.1-125.3 (Supp. 1972). The better drafted version enacted in many states is illustrated by Arizona Stat. Ann. § 13-1073A (Supp. 1972).

Our statute almost defies analysis. Apparently, an accused may violate G.S. 14-113.9(a)(1) in four distinct ways. Compare *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381 (1953). He may (1) *take*, (2) *obtain*, or (3) *withhold* a credit card from the person, possession, custody or control of another without the cardholder's consent; or (4) he may receive a credit card with intent to use it or sell it or transfer it to some person other than the issuer or cardholder, knowing at the time that the card had been so taken,

State v. Brunson

obtained or withheld. A person violating G.S. 14-113.9(a)(1) in any of the four enumerated ways is guilty of credit card theft. Of course, a person who commits the acts proscribed by G.S. 14-113.9(a)(2), (3) and (4) is also guilty of credit card theft.

Id. at 631-32, 197 S.E. 2d at 534.

N.C.G.S. 14-113.9(a)(1) was rewritten effective 1 August 1979, well before the time involved in this case. The General Assembly substituted the phrase "financial transaction card" for "credit card" and inserted the phrase "and with the intent to use it" near the middle of the subsection. 1979 N.C. Sess. Laws ch. 741, § 1. The subsection now reads:

§ 14-113.9. Financial transaction card theft. — (a) A person is guilty of financial transaction card theft when:

- (1) He takes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the card-holder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained or withheld, receives the financial transaction card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder . . .

The statute may still be violated in four ways: one may (1) take, (2) obtain or (3) withhold a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or one may (4) receive a financial transaction card with intent to use it or sell it or transfer it to a person other than the issuer or cardholder, knowing at the time that the card has been so taken, obtained or withheld, *i.e.*, knowing at the time he received it that another person had taken, obtained or withheld the card from the person, possession, custody or control of another without the cardholder's consent *and* with the intent to use it. Thus, the necessary implication from the use of the qualifier "so" is that when a defendant is charged with a violation of the *receiving* portion of the statute, he must have received a card from a third party who also intended to use it. Although this interpretation hinges upon a linguistic technicality, criminal laws must be strictly construed in favor of the defendant. *State v. Ross*, 272 N.C. 67,

State v. Brunson

157 S.E. 2d 712 (1967); *State v. Brown*, 264 N.C. 191, 141 S.E. 2d 311 (1965); *State v. Martin*, 7 N.C. App. 532, 173 S.E. 2d 47 (1970). Justice Huskins' pronouncement remains true — the statute almost defies analysis.

The indictment herein attempts to charge defendant under the receiving portion of the subsection. In order to charge receiving under the present wording of the statute, it must be alleged, among other elements, that at the time of receipt the defendant knew that the financial transaction card had been taken, obtained or withheld from the person, possession, custody or control of another without the cardholder's consent *and* with the intent to use it. The present indictment alleges: "At the time of receiving the credit card, the defendant knew that a person had unlawfully, wilfully, and feloniously taken, obtained, and withheld the credit card from the person, possession, custody, and control of J.V. Turner without [the] consent of J.V. Turner." The indictment fails to allege that the defendant knew that the card had been taken, obtained or withheld *with the intent to use it*, an essential element of the crime for which defendant was tried. The indictment thus fails to charge a crime, and defendant's motion to dismiss should have been allowed. N.C. Gen. Stat. 15A-924(a)(5) and (e). *See also State v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166 (1946). The state may, if it so elects, proceed against defendant upon a sufficient bill of indictment. *State v. Ingram*, 271 N.C. 538, 157 S.E. 2d 119 (1967). We find it unnecessary to discuss defendant's remaining arguments.

Judgment arrested.

Judges CLARK and ARNOLD concur.

State v. Campbell

STATE OF NORTH CAROLINA v. GARY GEORGE CAMPBELL, SR.

No. 8022SC985

(Filed 7 April 1981)

1. Jury § 5.1– improper jury selection procedure – harmless error

The trial court violated the requirement of G.S. 15A-1214(a) that prospective jurors be called “from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called” by beginning the jury selection process with only eleven members of the jury panel present, since not only was it certain that all eleven of the jurors would be placed in the jury box, but it was also impossible to have “random selection” of the eleventh juror once the other ten had been placed in the box. However, defendant was not prejudiced by such error where he exercised only two of the peremptory challenges afforded him under G.S. 15A-1217(b)(1).

2. Criminal Law § 72– opinion as to age – sufficient observation

In this prosecution for taking indecent liberties with minors, an officer's testimony that he had contacted defendant and taken a statement from him showed that the officer had sufficiently observed defendant to render admissible his opinion testimony that he had determined defendant's age to be 28 at the time of defendant's arrest.

3. Rape § 19– taking indecent liberties with minors – credibility of minor witness – sufficiency of evidence for jury

In this prosecution for taking indecent liberties with minors, inconsistencies in the testimony of the State's minor witness were not serious enough to render the witness's testimony inherently incredible, and the evidence was sufficient to support a jury finding that defendant took indecent liberties with three children “for the purpose of arousing or gratifying sexual desire” within the meaning of G.S. 14-202.1(a)(1) where it tended to show that defendant offered to give the children money for performing acts of a sexual nature and for not telling anyone.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 17 June 1980 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 13 February 1981.

Defendant was convicted by a jury on three counts of taking indecent liberties with children. G.S. 14-202.1. The record indicates that the jury selection for defendant's case began at 11:30 in the morning, that when the jury venire had reported to the court that morning the trial before defendant's had still been going on from the previous day, and that the court had excused the prospective jurors until 2:00 that afternoon. When the previous trial was completed at 11:30, the court seated the

State v. Campbell

eleven prospective jurors who had remained in the courtroom during the morning session. Defendant objected to the selection of the jury without the full panel being present. The voir dire proceeded, and of the eleven jurors present, the defendant excused one man and one woman, leaving nine jurors. After the noon recess remaining members of the venire reported in as instructed, three more prospective jurors were placed in the jury box, and jury selection proceeded. The record indicates no further challenges by the defendant.

At trial an officer of the Davidson County Sheriff's Department testified that he had contacted the defendant and procured a statement from him. He testified over defendant's general objection that he had determined defendant's age to be twenty-eight at the time of the arrest.

Further facts will be stated as necessary in the body of the opinion.

Attorney General Edmisten by Assistant Attorney General Frank P. Graham for the State.

Garry W. Frank for defendant appellant.

CLARK, Judge.

[1] Defendant assigns as error the selection of the jury on the grounds that beginning the voir dire with only eleven members of the jury venire violated the requirement of G.S. 15A-1214(a) that prospective jurors be called "from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." We agree with defendant that the court erred by proceeding to select a jury from a panel of only eleven. Not only was it certain that all eleven of the jurors would be placed in the box, but it was also impossible to "randomly select" the eleventh juror once the other ten had been placed in the box. At least as to that eleventh juror, everyone in the courtroom had "advance knowledge of the identity of the next juror to be called." *Id.*

Having shown error, the burden is on defendant to show how he was prejudiced thereby. G.S. 15A-1443(a); *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976). He does not. The record discloses defendant's exercise of only two of the peremptory

State v. Campbell

challenges afforded him under G.S. 15A-1217(b)(1). In overruling defendant's assignment of error, we follow the well-reasoned statement of Justice Stacy, speaking for our Supreme Court:

"It should be observed that no ruling relating to the qualification of jurors and growing out of challenges to the polls will be reviewed on appeal, unless the appellant has exhausted his peremptory challenges and then undertakes to challenge another juror. [Citation omitted.] His right is not to select but to reject jurors; and if the jury as drawn be fair and impartial, the complaining party would be entitled to no more than a new trial, and this he has already had on the first trial. [Citations omitted.] Hence the ruling, even if erroneous, would be harmless."

State v. Levy, 187 N.C. 581, 587-88, 122 S.E. 386, 390 (1924). See also *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975), *death penalty vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208, 96 S. Ct. 3207 (1976). We hold that the procedure of which defendant complains constitutes harmless error.

[2] Defendant next assigns as error the admission, over his general objection, of testimony by Lieutenant John Carickhoff of the Davidson County Sheriff's Department that he had determined defendant's age to be twenty-eight at the time of his arrest. We note that a lay witness may testify to his opinion as to the age of a defendant in a criminal case provided he had an adequate opportunity to observe and did in fact observe the defendant. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977). Prior to Officer Carickhoff's testimony that defendant was twenty-eight, he related that he had contacted defendant and taken a statement from him. We believe this provided the Lieutenant with the observation necessary to render his opinion admissible.

Defendant argues, however, that Carickhoff's statement was not one of opinion, but was inadmissible hearsay based on "his investigation of the case and discussions with the defendant and other parties." The record does not support this contention. Defendant cross-examined Lieutenant Carickhoff, but failed to address a single question to the Lieutenant's basis for his determination that the defendant was twenty-eight. In light of defendant's failure to base his objection on the hearsay rule, the inadequacy of the record to support defendant's claim

State v. Campbell

that the officer's determination was based upon hearsay, and the admissibility of the officer's statement as a lay opinion, we hold that the alleged inadmissibility of the statement as hearsay was not "clearly presented" to the trial court by defendant's general objection. G.S. 15A-1446(a).

[3] Defendant's final assignment of error is to the denial of his motions to dismiss at the close of the State's evidence and again at the close of all the evidence. He supports this argument first by pointing to inconsistencies in the evidence of one of the minors who testified against him. He admits that these inconsistencies all deal with collateral matters, but insists that taken together they lead to "serious questions concerning the credibility of the witness." We have examined these inconsistencies and do not consider them serious enough to render the witness's testimony inherently incredible. *Cf. State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967). The witness's credibility was therefore properly before the jury, and was not a question for the trial court. *See* 1 Stansbury's N.C. Evidence § 8 (Brandis Rev. 1973) and cases cited therein.

Defendant's second argument for why his motions to dismiss should have been granted is based on the requirement in G.S. 14-202.1 (a)(1) that the indecent liberties with which he is charged must have been performed "for the purpose of arousing or gratifying sexual desire. . . ." He argues that this was an essential element in the crime with which he was charged and that no direct evidence was presented relative to this element. A defendant's purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference. *See State v. Murdock*, 225 N.C. 224, 34 S.E. 2d 69 (1945). We have examined the record and find testimony that the acts of which defendant was convicted were of a sexual nature and were performed at his request. There is evidence that defendant offered to give the children money for performing the acts and for not telling anyone. We believe this evidence was sufficient to warrant the jurors' inference that the defendant took indecent liberties with these children "for the purpose of arousing or gratifying [his] sexual desire. . . ." G.S. 14-202.1(a)(1).

Defendant had a fair trial free from prejudicial error.

No error.

Judges ARNOLD and MARTIN (Harry C.) concur.

Boyce v. Boyce

RUTH S. BOYCE, PETITIONER v. ROBERT S. BOYCE, RESPONDENT

No. 8015SC838

(Filed 7 April 1981)

Appeal and Error § 6.2— order not final — appeal premature

In a proceeding for a partition sale of real property owned by the parties as tenants in common where petitioner, as a second claim, prayed that respondent be held to be indebted to her and that she have a lien on the proceeds of the sale on account of a deed of trust which had been placed on the property for the benefit of respondent, the trial court's order dismissing petitioner's second claim for relief was not appealable, since it was not a final judgment, all claims not having been determined, and the superior court did not make a finding that there was no just reason for delay, and since the order did not affect a substantial right which will work injury to petitioner if not corrected before final judgment. G.S. 1A-1, Rule 54(b); G.S. 1-277.

Judge HILL dissenting.

APPEAL by petitioner from *Brewer, Judge*. Order entered 20 May 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 12 March 1981.

Petitioner commenced this proceeding for a partition sale of real property she and the respondent owned as tenants in common. As a second claim in her petition, she prayed that the respondent be held to be indebted to her and that she have a lien on the proceeds of the sale on account of a deed of trust which had been placed on the property for the benefit of the respondent. The petitioner alleged that she had received none of the proceeds from the loan which the deed of trust secured and that she had not intended to make a gift to the respondent of the loan proceeds. At the time the deed of trust was placed on the property, the parties were married and owned the property as tenants by the entirety.

The court dismissed petitioner's second claim for relief, and the petitioner appealed.

Hogue and Strickland, by Lucy D. Strickland, for petitioner appellant.

Haywood, Denny and Miller, by James H. Johnson, III and Michael W. Patrick, for respondent appellant.

WEBB, Judge.

Boyce v. Boyce

The threshold question in this case is whether the order dismissing the petitioner's second claim for relief is appealable. It is not a final judgment since all claims have not been determined. It involves multiple claims but the superior court has not made a finding that there is no just reason for delay. For that reason, it is not appealable under G.S. 1A-1, Rule 54(b). A substantial right of the petitioner has been affected, but we do not believe it will work injury to the petitioner if this is not corrected before the final judgment. This keeps the order from being appealable under G.S. 1-277. See *Cook v. Tobacco Co.*, 47 N.C. App. 187, 266 S.E. 2d 754 (1980) and the cases cited therein for a discussion as to when an order affects a substantial right which will work injury to a party if not corrected before final judgment.

We hold that this appeal be dismissed. The petitioner will have her exception preserved to the entry of the order dismissing her second claim for relief and may appeal from the entry of a final judgment.

Appeal dismissed.

Judge HEDRICK concurs.

Judge HILL dissents.

Judge HILL dissenting:

I agree with the majority that "A substantial right of the petitioner has been affected"; but contrary to the majority, I "believe it will work injury to the petitioner if this is not corrected before the final judgment." I would hold that the trial court's order is appealable under G.S. 1-277.

The pleadings reveal that the property is encumbered by two notes secured by deeds of trust. The first deed of trust was executed in 1976 in the original amount of \$45,000. The second mortgage is in the sum of \$5,731.29 and was executed in 1978. Furthermore, ad valorem taxes become a lien on the premises each January 1. Both the interest and the taxes are joint obligations of each party. Hence, the sooner the property is sold and proceeds delivered to the parties as their interests may appear, the less the loss to each party.

Petitioner-Wife has alleged that the entire loan proceeds have been used by Husband exclusively for his purposes and

Boyce v. Boyce

that she did not make a gift to Husband of her share of the proceeds. Wife's one-half share of the loan proceeds is her separate property. N.C. Const., Art. X, § 4. Whenever a husband acquires such separate property, he is deemed to hold it in trust for his wife in the absence of any direct evidence that she intended to make a gift of it to him. The acquisition raises the presumption that the husband must account for the money. *Bowling v. Bowling*, 252 N.C. 527, 531, 114 S.E. 2d 228 (1960). Such a presumption, together with Wife's allegation that her share of the loan proceeds were not a gift, leads me to find that Wife's second cause of action states a claim for an account due.

In his response, Husband admits current monthly payments by himself on the notes until the filing of the action. These payments bar Husband's plea of the statutes of limitation set forth in his third answer and defense.

If Wife prevails in her claim against Husband, her judgment will be a secured lien against his undivided interest in the land. *See Wall v. Wall*, 24 N.C. App. 725, 212 S.E. 2d 238, *cert. denied*, 287 N.C. 264 (1975). The loss of such security is a loss of a substantial right to which Wife is entitled.

Both parties seek a partition sale of the property under the same statute. The question of the proposed distribution of the net proceeds of sale is properly before us. An adjudication now will hasten the solution to their problem. A delay in decision by this Court, coupled with a subsequent appeal, can only cost the parties interest, either as an expense or as a loss of income on each individual's share of proceeds from the sale, as well as an increase in taxes due. The loss of further security afforded by the possible judgment is likewise compelling. In my opinion, the judgment should be reversed.

State v. Jorgenson

STATE OF NORTH CAROLINA v. JAMES MARTIN JORGENSEN

No. 8027SC684

(Filed 7 April 1981)

1. Criminal Law § 169.3– exclusion of evidence – error cured by introduction of other evidence

In this prosecution for breaking and entering and larceny, defendant was not prejudiced by the exclusion of a warrant for arrest of the State's witness for felonious possession of the property allegedly stolen by defendant where an officer had testified that he went to the witness's apartment with a warrant for her arrest for possession of stolen goods, the witness testified that the case against her for possession of stolen goods had been dismissed, and the facts which the jurors could have divined from viewing the warrant thus were already before them.

2. Criminal Law § 69– telephone conversation – identity of defendant as caller

The evidence was sufficient to permit an inference that a witness recognized defendant's voice when he called her on the telephone subsequent to bringing a stolen television set to her apartment, and the witness was properly permitted to testify as to the telephone conversations with defendant, where the witness testified that she had known defendant for five or six years and that she had conversed with defendant as recently as when he brought the stolen television set to her apartment.

3. Criminal Law § 128.2– threatening telephone calls – non-responsive statement – instruction to jury – denial of mistrial

The trial court did not err in failing to declare a mistrial because of a witness's non-responsive statement that she had received threatening telephone calls from defendant where the trial court granted defendant's motion to strike the statement and twice instructed the jury to "not consider that."

4. Larceny § 8.3– erroneous instructions favorable to defendant

The trial court's erroneous instruction that, for the jury to find defendant guilty of felonious larceny, the State had to prove beyond a reasonable doubt that defendant took and carried away *all* the items of personal property described in the indictment placed a greater burden on the State than it was required to sustain and was therefore not prejudicial to defendant where the larceny was committed pursuant to a breaking and entering, since the taking and carrying away of any one of the items would have sufficed to sustain a conviction of felonious larceny without regard to the value of the property taken. G.S. 14-72(b)(2).

APPEAL by defendant from *Kirby, Judge*. Judgment entered 22 February 1980 in Superior Court, GASTON County. Heard in the Court of Appeals 2 December 1980.

State v. Jorgenson

Defendant was charged in a proper bill of indictment with the felonious breaking and entering of a river cabin occupied by Robah L. Robinson with intent to commit the felony of larceny, and with larceny therefrom of several items of the personal property of Robah L. Robinson having a value in excess of \$200.00. The evidence for the State tended to show that defendant and Jan Lane went to Robinson's river cabin sometime after 6:00 p.m. on 27 August 1979. Defendant broke the lock on the gate and pried open the bolt on the cabin door. Defendant and Lane then took and carried away numerous items of personal property which belonged to Robinson. They left the items at defendant's apartment, with the exception of a television set, which they took to an apartment occupied by Lane and Marlene H. Thomas. Law enforcement officers, in response to a phone call from an informant, subsequently purchased the television set from Thomas.

The jury found defendant guilty of felonious breaking or entering and felonious larceny. From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Jo Anne Sanford, for the State.

Kellum Morris, Assistant Public Defender, for defendant appellant.

WHICHARD, Judge.

[1] Defendant first assigns error to the trial court's refusal to permit circulation among the jurors of Defendant's Exhibit No. 1, a warrant for arrest of the State's witness Marlene H. Thomas for felonious possession of the property allegedly stolen by defendant. Prior to introduction of the warrant into evidence, a law enforcement officer had testified that he and another officer went to the witness Thomas' apartment with a warrant for her arrest for possession of stolen goods. Further, the witness Thomas had testified: "The case against me for possession of stolen goods was dismissed. I agreed to testify." The facts which the jurors could have divined from viewing the warrant thus were already before them. Under these circumstances to allow the jury to view the warrant would have the same effect as would the admission of evidence which is merely cumulative or repetitious. The exclusion of such evidence repeatedly has been

State v. Jorgenson

held to be non-prejudicial. See *State v. Tyson*, 242 N.C. 574, 89 S.E. 2d 138 (1955). This assignment of error is overruled.

[2] Defendant next assigns error to the admission of testimony regarding telephone conversations between defendant and the witness Thomas "without first requiring the State to lay the proper foundation." The essence of defendant's contention is that he was never identified as the caller. It is true that "[b]efore a witness may relate what he heard during a telephone conversation with another person, the identity of the person with whom the witness was speaking must be established." *State v. Richards*, 294 N.C. 474, 480, 242 S.E. 2d 844, 849 (1978), quoting from *State v. Williams*, 288 N.C. 680, 698, 220 S.E. 2d 558, 571 (1975). However, "[t]he broad statement that the conversation of a person at the other end is never admissible until he is identified cannot be sustained by authority. . . . It is only necessary that identity of the person be shown directly or by circumstances somewhere in the development of the case" *State v. Strickland*, 229 N.C. 201, 208, 49 S.E. 2d 469, 474 (1948) (emphasis supplied).

Here, the testimony complained of was elicited, not by questions relating to telephone conversations the witness Thomas had with defendant, but by a question relating to conversations in general. The witness was asked: "Since you have signed the statement to the police, how many conversations have you had with . . . the defendant?" After the court overruled defendant's objection the witness responded: "I had several conversations with him, threatening phone calls for one." She further testified, also over objection: "He asked if I had turned him in and I told him I did not want to talk about it, or talk to him, and I hung up." The witness previously had testified that she had known the defendant for five or six years. She also had testified that she had conversed with defendant as recently as when he brought the stolen television set to her apartment. We find these circumstances sufficient to permit an inference that the witness recognized defendant's voice when he called on the telephone subsequent to bringing the television set to the witness' apartment. This assignment of error, therefore, is overruled.

[3] Defendant also assigns error to the court's failure to declare a mistrial on account of the witness' non-responsive state-

State v. Jorgenson

ment that she had received threatening phone calls from defendant and to its failure adequately to instruct the jury with reference to disregarding the statement. "A motion for mistrial in a case less than capital is addressed to the trial judge's sound discretion and his ruling thereon is not reviewable without a showing of gross abuse." *State v. Yancey*, 291 N.C. 656, 664, 231 S.E. 2d 637, 642 (1977). The court here granted defendant's motion to strike the witness' statement. It also instructed the jury, not once but twice, "do not consider that." We find no "showing of gross abuse" in this method of exercising the trial court's discretion. We also find the court's twice-given instruction to the jury to "not consider that" to be adequate; and "[i]t is presumed that the jury heeded the court's instruction and that any prejudicial effect of the testimony was removed." *State v. Davis*, 10 N.C. App. 712, 713, 179 S.E. 2d 826, 828 *review denied* 278 N.C. 522, 180 S.E. 2d 610 (1971). Finally, we find defendant's contention that the instruction was not sufficiently precise to inform the jury as to what it was to disregard to be without merit. These assignments of error are overruled.

[4] Defendant next assigns error to the court's instructions to the jury regarding the charge of felonious larceny. We note that the record contains only those portions of the charge to which defendant excepts and assigns error. Defendant thus has failed to comply with North Carolina Rules of Appellate Procedure, Rule 9(b)(3), which provides, in pertinent part, as follows: "The record on appeal in criminal actions shall contain: . . . (vi) where error is assigned to the giving or omissions of instructions to the jury, a transcript of the entire charge given . . ." Further, we note that the instructions complained of were actually favorable to defendant in that they placed a greater burden on the State than the law required. The court instructed the jury that for it to find the defendant guilty of felonious larceny, the State had to prove beyond a reasonable doubt that defendant took and carried away *all* the items of personal property described in the indictment. Because the larceny here was committed pursuant to a breaking and entering in violation of G.S. 14-54, the taking and carrying away of any one of the items described would have sufficed to sustain a conviction of felonious larceny, without regard to the value of the property taken. G.S. 14-72(b)(2). The instruction thus placed a greater burden on the State than it was required to sustain, and it can

State v. Owen

scarcely have been prejudicial to the defendant. This assignment of error is overruled.

Defendant finally assigns error to the denial of his motion to set aside the verdicts as being contrary to the greater weight of the evidence. In *State v. Shepherd*, 288 N.C. 346, 353, 218 S.E. 2d 176, 180-181 (1975), our Supreme Court stated, per Justice Copeland:

Under this motion the trial court is "[V]ested with discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony." . . . The decision of the court involves the exercise of its discretion. This is a question of law and not reviewable.

This assignment of error is overruled.

We find that defendant had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. CHARLES E. OWEN

No. 8029SC1012

(Filed 7 April 1981)

Narcotics § 4.3—manufacturing marijuana — constructive possession — sufficiency of evidence

In a prosecution for the manufacture of marijuana where the State offered evidence that defendant lived in one of two adjacent trailers, that a worn path leading from a marijuana patch ended in grass between the two trailers some 10 or 15 feet behind them, and that the path would have been easily accessible to both defendant and an occupant of the other trailer, had it been occupied, and defendant offered testimony by a witness that he had lived in the trailer next to defendant's but that he did not know the marijuana patch was there before a raid by law officers, evidence was sufficient for the jury to find that defendant was in constructive possession of the marijuana patch and that he was guilty of manufacturing marijuana.

State v. Owen

APPEAL by defendant from *Lewis (Robert D.)*, Judge. Judgment entered 11 October 1979 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 4 March 1981.

Defendant was found guilty, as charged, of manufacturing marijuana on or about 21 August 1979, and he appeals from the judgment imposing a prison term of three years, suspended for probation with special conditions.

STATE'S EVIDENCE

The witnesses for the State were two law officers, who testified in substance that they found a patch of marijuana on a ridge located behind the defendant's trailer. There was another trailer located beside the one occupied by defendant but neither officer knew if the other trailer was occupied at that time. The patch was located 50 to 100 feet from the two trailers. There was a worn path or trail from the patch down the ridge and ending in the grass some 10 to 15 feet from the trailers. The land on which the trailers sat and where the marijuana patch was located was not owned by defendant. There were no other residences within a half mile of the patch.

Behind defendant's trailer under a tree was some manure and dirt.

Defendant's motion to dismiss was denied.

DEFENDANT'S EVIDENCE

The distance from defendant's trailer to the marijuana patch by way of the path was 176 feet.

The trailer next to defendant's had been occupied since January 1979.

Defendant's motion to dismiss at the close of all the evidence was denied.

Attorney General Edmisten by Assistant Attorney General Archie W. Anders for the State.

Ramsey, White & Cilley by Robert S. Cilley for defendant appellant.

CLARK, Judge.

The evidence, considered in the light most favorable to the

State v. Owen

State, was sufficient to support the jury finding that the defendant was guilty of manufacturing marijuana.

The burden was on the State to offer substantial evidence that defendant was in constructive possession of the patch of marijuana plants located near the trailer occupied by the defendant. *See State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Constructive possession of a contraband material exists when there was no actual personal dominion over the material but when there is an intent and capability to maintain control and dominion over it. *State v. Davis*, 25 N.C. App. 181, 212 S.E. 2d 516 (1975).

The defendant moved to dismiss upon the close of the State's evidence. G.S. 15A-1227. The trial court erred in denying the motion because there was not substantial evidence that defendant was in constructive possession of the patch of marijuana plants located near his trailer. The arresting officer testified that he did not know whether the other trailer, beside the one occupied by defendant, was occupied. The worn path leading from the marijuana patch ended in grass between the two trailers, some 10 or 15 feet behind the two trailers, and the path or trail would have been easily accessible to both defendant and an occupant of the other trailer if the other trailer were occupied.

The defendant, however, did not elect to rest and rely on the weakness of the State's evidence at that stage of the trial. Instead, the defendant elected to introduce evidence, and in doing so he waived the motion for dismissal at the close of the State's evidence. G.S. 15-173; *State v. Alston*, 44 N.C. App. 72, 259 S.E. 2d 767 (1979); *State v. Stevens*, 9 N.C. App. 665, 177 S.E. 2d 339 (1970).

The defendant renewed his motion to dismiss upon the close of all the evidence, which presented the question of the sufficiency of all of the evidence to go to the jury. The defendant offered as a witness William E. Newman, Jr., who testified that he had lived in the trailer next to defendant's since January 1979, but that he did not know the marijuana patch was there before the raid on 21 August 1979. It must be concluded that since Newman had no knowledge of the marijuana patch he did not use the worn path leading from between the two trailers to the marijuana patch, and the only reasonable inference is that

State v. Owen

it was defendant who regularly used the worn path in going from his trailer to the marijuana patch for the purpose of planting and cultivating (manufacturing) the marijuana plants.

In *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975), Justice Huskins wrote:

“A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intentment and every reasonable inference to be drawn therefrom. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972); *State v. Greene*, 278 N.C. 649, 180 S.E. 2d 789 (1971). All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. *State v. Cutler*, *supra*; *State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966). If there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. Norggins*, 215 N.C. 220, 1 S.E. 2d 533 (1939).”

Applying these governing principles to all the evidence in this case, we hold the evidence sufficient to support the jury verdict.

There are several recent cases involving constructive possession of marijuana plants growing in a field, *see State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Blackburn*, 34 N.C. App. 683, 239 S.E. 2d 626 (1977), *disc. rev. denied*, 294 N.C. 442, 241 S.E. 2d 522 (1978); *State v. Wiggins*, 33 N.C. App. 291, 235 S.E. 2d 265, *cert. denied*, 293 N.C. 592, 241 S.E. 2d 513 (1977). The factual circumstances vary, and none of the three are substantially similar to the case *sub judice*, where the circumstances point unerringly to defendant. Here defendant, by his own evidence, has directed suspicion away from the occupant of the nearby trailer, leaving himself as the only likely constructive possessor of the marijuana patch.

We have examined and considered defendant's other

Jaudon v. Swink

assignments of error and arguments and find them to be without merit.

No error.

Judges ARNOLD and MARTIN (Harry C.) concur.

ROBERT H. JAUDON D/B/A FOXFIRE REALTY v. MICHAEL L. SWINK

No. 8030DC854

(Filed 7 April 1981)

Brokers and Factors § 6—real estate broker—right to commission—sufficiency of evidence

In an action by plaintiff real estate broker to recover a commission on property listed with plaintiff by defendant, evidence was sufficient to be submitted to the jury where it tended to show that the oral agreement by which defendant listed his house and acreage for sale was for an indefinite period of time; plaintiff took the ultimate buyer to the property and no one else showed the property to him; two written offers were executed by the buyer and communicated to defendant; though the evidence was contradictory, a jury could find that defendant knew that the ultimate purchaser was the person interested in buying the property; after defendant rejected the second written offer, he advised plaintiff that he was taking the property off the market; the ultimate purchaser and his wife went back to the property the next day and entered into a contract to buy it directly from defendant; and the evidence thus raised an issue as to whether defendant terminated the listing agreement in good faith.

APPEAL by plaintiff from *Leatherwood, Judge*. Judgment entered 5 June 1980 in District Court, JACKSON County. Heard in the Court of Appeals 13 March 1981.

Plaintiff brings this action for a real estate commission arising out of a transaction with defendant. At trial, plaintiff produced evidence that on 27 June 1979 defendant, by oral agreement, listed his house and acreage with plaintiff for sale. The listing agreement was for an indefinite period of time. Defendant originally stated a selling price of \$55,000 but later reduced it to \$50,000. Plaintiff told defendant that the real estate commission would be six percent. Plaintiff accepted the

Jaudon v. Swink

listing and commenced efforts to produce a purchaser for defendant's property. Plaintiff advertised the property for sale, secured keys to it, and on 10 August 1979 showed the property to Mr. and Mrs. Donald Hughes. They made a written offer of \$42,000 for the property. Plaintiff advised defendant of the Hughes offer and it was rejected by him. On 16 August 1979, the Hughes again visited the property. Defendant and his daughter were at the property on this occasion. That same day Hughes made an offer of \$45,000 for the property, which was communicated to defendant on 23 August 1979. He rejected this offer and advised plaintiff that he was taking the property off the market. Later that day, plaintiff told Hughes of the refusal and returned his \$1,000 deposit to him. Hughes and his wife went back to the property the next day and entered into a contract to buy it directly from Swink for a price of \$46,500. The sale was closed on 17 September 1979. No one other than plaintiff and his wife showed the property to Hughes. Swink and Hughes discussed that the property had been listed for sale with a broker.

At the close of plaintiff's evidence, defendant's motion for a directed verdict was allowed, and plaintiff appeals.

Holt, Haire & Bridgers, by R. Phillip Haire, for plaintiff appellant.

Orman L. Hamilton for defendant appellee.

MARTIN (Harry C.), Judge.

Of course, it is familiar learning that on defendant's motion for directed verdict, the evidence must be considered in the light most favorable to plaintiff, giving it all reasonable inferences beneficial to plaintiff and resolving all discrepancies in the evidence in plaintiff's favor. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971).

It is the general rule that in order to recover a real estate commission a realtor must show that he procured a purchaser, during the period of the listing agreement, who is ready, willing and able to purchase the property on terms approved by the seller. *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E. 2d 486 (1968). In *Realty Agency*, the Court held:

Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever

Jaudon v. Swink

he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner. . . . If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commision [sic] provided the case is not taken out of the rule by the contract of employment. . . . The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services. The term *procuring cause* refers to "a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms." 12 C.J.S. *Brokers* § 91, p. 209 (1938). . . .

The law does not permit an owner "to reap the benefits of the broker's labor without just reward" if he has requested a broker to undertake the sale of his property and accepts the results of services rendered at his request. In such case, in the absence of a stipulation as to compensation, he is liable for the reasonable value of those services. . . . Of course, the listing agreement can make the payment of commissions dependent upon the broker's obtaining a certain price for the property.

Id. at 250-51, 162 S.E. 2d at 491.

Here, the contract of sale to Hughes was entered into the day after Swink terminated the listing agreement. The listing agreement had no definite period of duration; therefore, it was revocable at will by either party, subject to the ordinary requisites of good faith. *Bonn v. Summers*, 249 N.C. 357, 106 S.E. 2d 470 (1959); *Insurance Co. v. Disher*, 225 N.C. 345, 34 S.E. 2d 200 (1945). "Good faith" means an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with the absence of all information, notice, or benefit or belief of facts which could render a transaction unconscientious. *Black's Law Dictionary* 822 (4th ed. rev. 1968).

Jaudon v. Swink

We hold that the evidence, considered as required on defendant's motion, is sufficient to submit to the trier of the facts the question whether defendant terminated the listing agreement in good faith. An owner cannot ignore the efforts of a real estate broker and escape liability for commissions by terminating a listing agreement for the purpose of avoiding such commissions and dealing directly with a purchaser who was produced as a result of the broker's efforts. *See Cromartie v. Colby*, 250 N.C. 224, 108 S.E. 2d 228 (1959). In *Martin v. Holly*, 104 N.C. 36, 39, 10 S.E. 83, 84 (1889), the Court stated:

"An agent employed to sell real estate, in finding a purchaser, and bringing him and his principal into communication, and setting on foot negotiations which result in a sale, cannot be deprived of his right to compensation by a discharge prior to the consummation of the sale."

The evidence is also sufficient to support a jury finding that plaintiff produced Hughes as the purchaser of defendant's property. Plaintiff took Hughes to the property and no one else showed the property to Hughes. Two written offers were executed by Hughes and communicated to defendant. Although the evidence is contradictory, a jury could find that defendant knew that Hughes was the person interested in buying the property. On 24 August, when defendant and Hughes signed the contract of purchase, they discussed the prior listing of the property and defendant certainly knew then that Hughes was the person who made the offers for the property. Plaintiff found the purchaser and was engaged in negotiations for the sale when defendant "took the property off the market," then sold it directly to the purchaser the next day. *See Martin v. Holly, supra*. This question was for the twelve. *Lindsey v. Speight*, 224 N.C. 453, 31 S.E. 2d 371 (1944).

The court erred in allowing defendant's motion for a directed verdict and the judgment is

Reversed.

Judges CLARK and ARNOLD concur.

Rosenstein v. Mechanics and Farmers Bank

ROBERT N. ROSENSTEIN v. MECHANICS AND FARMERS BANK AND
WILMA L. ROSENSTEIN v. MECHANICS AND FARMERS BANK

No. 8014SC784

(Filed 7 April 1981)

Banks and Banking § 3—savings account—depositors' assignment not accepted by bank

The trial court erred in finding and concluding that savings accounts were validly assigned by the depositors to plaintiffs where the passbook rules governing the accounts in issue included the rule that "no assignment or transfer of the Bank Book need be recognized by the Bank unless it consents thereto, and a memorandum thereof entered in said Book"; the rules reference to the Bank Book referred to the money represented thereby and not the passbook containing a record of the transactions between the bank and the depositors; the bank received a letter notifying it of the depositors' sale and assignment of the two accounts on 7 July 1975; and on the same day, the president of the bank wrote to plaintiffs' attorney, and sent a copy to plaintiffs, advising them that the bank refused to accept the assignments and that the accounts were not negotiable.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 12 March 1980 and amended 24 March 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 March 1981.

C. Paul Roberts and wife, Becky M. Roberts, were the owners of two savings accounts deposited with Mechanics and Farmers Bank, one in the sum of \$88,620.83 and the second in the sum of \$49,719.01. The two accounts were pledged to the bank as collateral to cover any deficiency which might arise in possible foreclosures of various real estate notes secured by mortgages owned by the bank.

On 18 June 1975, Mr. and Mrs. Roberts sold and assigned by written instrument the two accounts to Robert N. Rosenstein and Wilma L. Rosenstein. A letter notifying the bank of the sale and assignments of the two accounts, subject to the possible setoffs mentioned, was received by the bank on 7 July 1975. On the same day, the president of the bank wrote the Rosensteins' attorney, with a copy to the Rosensteins, advising them that the bank refused to accept the assignments; that in his opinion the accounts were not negotiable and were subject to any defenses or offsets which the bank may have against the Robert-

Rosenstein v. Mechanics and Farmers Bank

ses. Thereafter, offsets totaling \$10,700 were made to cover deficiencies in the notes secured by mortgages foreclosed. Furthermore, over a period of two and one-half years thereafter the bank permitted withdrawals to third persons, or the Robertses, until the accounts were almost totally depleted.

Plaintiffs began this cause of action for recovery of the savings accounts, less the setoffs for foreclosure deficiencies, on 16 February 1978. The trial judge, sitting without a jury, made findings of fact and conclusions of law and awarded judgments to the Rosensteins for the original amount of the accounts, plus accrued interest and less offsets paid out on the foreclosed notes and mortgages. The bank appeals.

Mount, White, King, Hutson, Walker & Carden, by Richard M. Hutson II; and Nye, Mitchell, Jarvis & Bugg, by Charles B. Nye, for plaintiff appellees.

James B. Craven III for defendant appellant.

HILL, Judge.

Four questions are raised by the bank on appeal, but we find one to be dispositive. Did the court err in finding and concluding that the Robertses' savings accounts were validly assigned to the Rosensteins?

It is undisputed that a savings account may be assigned or transferred by a depositor. *Lipe v. Bank*, 236 N.C. 328, 72 S.E. 2d 759 (1952). This is simple contract law, but a contract must be construed by looking at it from all "four corners." The passbook rules governing the account at issue include, among other things, the following:

11. No assignment or transfer of the Bank Book need be recognized by the Bank unless it consents thereto, and a memorandum thereof entered in said Book.

The Rosensteins would distinguish between an assignment of the passbook (bank book) and the deposit. Such an argument is illusory. The passbook is a record of the contract transaction between the bank and the depositor. Other than this purpose, it is practically worthless. A deposit may be validly assigned without the delivery of a passbook. *McCabe v. Union Dime Sav. Bank*, 150 Misc. 157, 268 N.Y.S. 449, 451 (1934). We conclude that the passbook rule quoted above refers to the money repre-

Rosenstein v. Mechanics and Farmers Bank

sented by the passbook as the subject of transfer or assignability.

The Rosensteins further contend that the bank failed to show at trial that in adopting the regulations affecting the passbook it complied with G.S. 53-66. This statute reads as follows:

§ 53-66. *Savings Deposits.* — Any bank conducting a savings department may receive deposits on such terms as are authorized by its board of directors and agreed to by its depositors. The board of directors shall prescribe the terms upon which such deposits shall be received and paid out, and a passbook or other evidence of deposit shall be issued to each depositor containing the rules and regulations adopted by the board of directors governing such deposits. *By accepting such book or such other evidence of deposit the depositor assents and agrees to the rules and regulations therein contained.* (Emphasis added.)

The Rosensteins demanded that the original books of the board of directors in which the rules and regulations were adopted be produced. They were not offered into evidence, but two officers testified the rules had been in effect for years — one testifying they had been in existence since 1948 or 1949. Any failure to produce the minute book of the board of directors was harmless. The last sentence of the statute put a depositor on notice. The board of directors could have ratified the rules and regulations at anytime.

We conclude the trial judge erred in his conclusion that the accounts were validly assigned to the Rosensteins. The bank acted with all haste upon receipt of notice of the purported assignment in advising the Rosensteins that it refused to acknowledge the assignments and sales of the deposits. The notice of such refusal was received by the Rosensteins and their attorney. What the bank and Mr. and Mrs. Roberts did with the accounts thereafter was immaterial.

The judgment of the trial judge is

Reversed.

Judge WEBB concurs.

Judge HEDRICK dissents.

State v. Simmons

HEDRICK, Judge, dissenting:

In my opinion the evidence supports the critical findings and conclusions made by Judge Bailey, and the judgment ought to be affirmed.

STATE OF NORTH CAROLINA v. MAYNARD HOWARD SIMMONS

No. 808SC1006

(Filed 7 April 1981)

Automobiles § 126.4—breathalyzer test — failure to show warnings to defendant — competency of testimony by arresting officer

Where the defendant by his voluntary and overt actions made it clear that he would not voluntarily submit to a breathalyzer test, it was not necessary for the State to present evidence that the defendant was advised of his right to refuse the breathalyzer test before evidence of that refusal could be used against him at a trial for driving under the influence pursuant to G.S. 20-139.1. Furthermore, the arresting officer was competent to testify as to that refusal in the trial for driving under the influence.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 31 July 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 3 March 1981.

Defendant appeals from a conviction of driving a motor vehicle on a street or highway while under the influence of intoxicating beverage. The State's evidence at trial consisted of the testimony of Officer C.E. Boltinhouse, of the Goldsboro Police Department. Officer Boltinhouse testified that at 1:20 p.m. on 6 April 1980, he stopped a 1963 Ford automobile because of the excessively loud noise coming from the car's muffler. Boltinhouse observed two males, two females and opened cans of beer in the front and back seat of the car. Defendant was the driver of the car. Smelling a strong odor of alcohol on defendant's breath, Boltinhouse requested that defendant get out of the car and walk to the police car. Defendant completed this walk "very unsteady and swaying." At Boltinhouse's request, defendant attempted the following sobriety test: with eyes closed, arms held straight out, and head back, defendant

State v. Simmons

attempted to touch his nose with his right, and then his left, index finger. Defendant missed his nose on each attempt. Boltinhouse then placed defendant under arrest for driving under the influence and carried defendant in the patrol car to the Goldsboro Police Department, a five minute ride, for a breathalyzer test. Defendant's speech during this ride was slurred, thick-tongued and belligerent. Once at the breathalyzer room of the police department, Boltinhouse informed the breathalyzer operator that he was requesting defendant to take the test, but defendant refused to take the test. At this point, defendant informed Boltinhouse that the machine was not accurate and that defendant would not take the test for that reason. Defendant stated that Boltinhouse was under the influence and that he (defendant) was placing Boltinhouse under citizen's arrest. Officer Boltinhouse also testified that in his opinion defendant's mental and physical faculties were impaired because defendant was under the influence of alcoholic beverages.

The trial judge denied defendant's motion to dismiss the charge of driving under the influence. Defendant offered no evidence.

Attorney General Rufus L. Edmisten, by Associate Attorney Richard H. Carlton, for the State.

John W. Dees for defendant appellant.

WELLS, Judge.

In his only assignment of error defendant argues that the court erred in allowing Boltinhouse to testify that defendant refused the breathalyzer test and in including a jury instruction concerning the failure of the defendant to take the breathalyzer test. Defendant first contends that G.S. 20-139.1(f) requires that all provisions of G.S. 20-16.2 must be complied with before a refusal to submit to the breathalyzer test is admissible against him and that there is no evidence in the record establishing such compliance. Defendant also argues that under G.S. 20-139.1, an arresting officer's testimony regarding any matter relating to the breathalyzer test is incompetent. We reject both arguments. We hold that where, as in this case, the defendant by his voluntary and overt actions makes it clear that he will not voluntarily submit to the breathalyzer test, it is not necessary for the State to present evidence that

State v. Costigan

the defendant was advised of his right to refuse to take the breathalyzer test before evidence of that refusal may be used against him at a trial for driving under the influence, as is allowed pursuant to G.S. 20-139.1. It is settled law that the arresting officer may testify as to that refusal at a trial for driving under the influence. *State v. Flannery*, 31 N.C. App. 617, 622, 230 S.E. 2d 603, 606 (1976).

No error.

Judges VAUGHN and BECTON concur.

STATE OF NORTH CAROLINA v. SEAN PETER COSTIGAN

No. 8010SC1043

(Filed 7 April 1981)

Burglary and Unlawful Breakings § 5.5- feloniously breaking and entering - intent to commit larceny - sufficiency of evidence

In a prosecution for felonious breaking and entering evidence with respect to defendant's intent to commit larceny was sufficient to be submitted to the jury where it tended to show that, after defendant had gained entry to a home by breaking the glass in the rear door, an occupant therein heard sounds of a kitchen drawer being opened, silverware being handled, and the drawer being closed; defendant then proceeded to climb the stairway leading to the bedrooms; and after being confronted by the occupant of the home, defendant fled.

APPEAL by defendant from *Canaday, Judge*. Judgment entered 12 August 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 11 March 1981.

Defendant was indicted for violating N.C. Gen. Stat. §14-54(a) by feloniously breaking and entering the residence of Elizabeth Kelly with the intent to commit larceny therein. At trial, the State presented evidence through the testimony of Mrs. Kelly tending to show that Mrs. Kelly and her two sons lived in a single-family residence in Raleigh, North Carolina; that on the morning of 19 March 1980, her two sons went to school and Mrs. Kelly went to work at 8:00 or 8:30, after locking all the doors to her home; that Tony Long, an overnight guest,

State v. Costigan

was the only person present in her home when she left for work; that at 10:00 a.m. she received a telephone call from Mr. Long advising her that something had happened at her home; that she returned to the house immediately and found glass in the rear door of her home had been broken out and that nothing had been taken from her home; that the defendant had been a guest in her house on one occasion; and that she had not given the defendant permission to break the glass in the rear door. Tony Long testified that on the morning of 19 March 1980, he went back to sleep when Mrs. Kelly left for work; that sometime later the telephone rang, but he had not answered it; that soon thereafter the doorbell rang; that he got up and started to dress; that while he was dressing, he heard footsteps on the deck in the rear of the house, immediately followed by a knock on the rear door; that he then "heard the downstairs window in the kitchen being busted, and then I heard the person actually inside the house,"; that he heard a drawer in the kitchen being opened, the sound of silverware being handled, and the drawer being closed; that he picked up an empty bottle and waited for the intruder to come up the stairs; that as he heard the intruder approach, he jumped out at him and was face-to-face with the intruder; that the intruder turned and ran out of the house; and that he recognized the intruder as being the defendant, whom he had met several times previously. Mr. Long selected the defendant's picture from a photographic display a few days after the incident.

The defendant made a motion to dismiss at the close of the State's evidence, which was denied. The defendant did not present any evidence in his behalf.

The jury found the defendant guilty of felonious breaking and entering. From a judgment sentencing him to a prison term of six years, defendant appeals.

Attorney General Edmisten by Assistant Attorney General David Gordon, for the State.

William A. Smith, Jr., for the defendant-appellant.

MARTIN (Robert M.), Judge.

By his appeal, defendant challenges the sufficiency of the evidence to justify submission to the jury of the issue of felonious breaking and entering in violation of N.C. Gen. Stat. §

State v. Costigan

14-54(a). More specifically, the defendant argues that the State failed to present sufficient evidence of an essential element of the crime as charged, i.e., an intent to commit larceny. We disagree.

N.C. Gen. Stat. § 14-54(a) makes it a crime to break or enter any building "with intent to commit . . . larceny therein." An essential element of the crime is the specific intent to steal existing at the time of the breaking or entering. *State v. Hill*, 38 N.C. App. 75, 247 S.E. 2d 295 (1978). After examining the evidence in the record, considering it, as we must, in the light most favorable to the State, *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1971), we conclude that the State presented substantial evidence of defendant's intent to commit larceny in Mrs. Kelly's home, justifying submission of the case to the jury.

Upon motion to nonsuit it is incumbent upon the trial court to consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence regardless of whether the evidence is direct, circumstantial, or both, and if there is evidence from which a jury could find that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be overruled. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). Intent is a mental attitude and can seldom be proved by direct evidence and is most often proved by circumstances from which it can be inferred. *State v. Kendrick*, 9 N.C. App. 688, 177 S.E. 2d 345 (1970). Also in *State v. Smith*, 266 N.C. 747, 748-749, 147 S.E. 2d 165 (1966), it was stated: "Under G.S. 14-54, if a person breaks or enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent . . ."

State v. Harlow, 16 N.C. App. 312, 315, 191 S.E. 2d 900, 902 (1972).

The State offered proof at trial that after the defendant had gained entry to the Kelly home by breaking the glass in the rear door, Mr. Long had heard the sounds of a drawer in the kitchen being opened, silverware being handled, and the drawer being closed. The defendant then had proceeded to climb the stairway leading to the bedrooms. After being confronted by Mr. Long,

State v. Dobson

the defendant had fled. In our opinion, this circumstantial evidence was sufficient to justify submission of the issue of defendant's intent to the jury. "The fact that the evidence is circumstantial does not make it insufficient." *State v. Hill, supra* at 79, 247 S.E. 2d at 297. The jury may infer the requisite specific intent to commit larceny at the time of the breaking or entering from "the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged." 4 Strong, N.C. Index 3d, Criminal Law, § 2, p. 34." *Id.*

After carefully examining the record on appeal, we conclude that the defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. MICKEY WAYNE DOBSON

No. 8029SC986

(Filed 7 April 1981)

Criminal Law § 149.1—granting of motion to suppress evidence – appeal by State

The State had no right to appeal an order granting defendant's motion to suppress evidence where the record failed to show that the prosecutor certified to the judge who granted the motion that the appeal was not being taken for the purpose of delay and that the suppressed evidence was essential to the case as required by G.S. 15A-979(c).

APPEAL by the State from *Gaines, Judge*. Order signed 7 July 1980 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 2 March 1981.

This is a criminal action in which the defendant was charged with two counts of felonious breaking or entering and two counts of felonious larceny after breaking or entering. Prior to trial, the defendant moved to suppress evidence, consisting of stolen firearms, obtained from his suitcase and automobile on the grounds that the warrantless searches and sei-

State v. Dobson

zures violated his Fourth Amendment rights under the United States Constitution. After a hearing on the motion, the trial court entered an order granting defendant's motion to suppress. The order includes the following statement: "to which findings of fact and conclusions of law and ruling, the State, in apt time, objects and excepts and gives notice of appeal to the Court of Appeals."

Attorney General Edmisten by Associate Attorney Evelyn M. Coman, for the State-appellant.

V. Scott Peterson for the defendant-appellee.

MARTIN (Robert M.), Judge.

We reluctantly must dismiss this appeal on the grounds that this Court lacks jurisdiction. As a general rule, the State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case in the absence of a statute clearly conferring that right. *State v. Harrell*, 279 N.C. 464, 183 S.E. 2d 638 (1971); *State v. Horton*, 7 N.C. App. 497, 172 S.E. 2d 887 (1970). N.C. Gen. Stat. § 15A-1445 provides when the State may appeal in a criminal case as follows:

(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:

- (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
- (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979.

In subsection (c) of N.C. Gen. Stat. § 15A-979 (Supp. 1979), the General Assembly made orders of the superior court granting motions to suppress evidence appealable to the appellate division prior to trial "*upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.*" (Emphasis added.) In our opinion, the above-quoted language constitutes a statutory prerequisite which must be met in order

N.C. Grange Ins. Co. v. Johnson

for the State to have the right to appeal, prior to trial, an order granting a motion to suppress. Statutes authorizing an appeal by the prosecution must be strictly construed. *State v. Harrell, supra*; *State v. Horton, supra*.

In the present case, the portion of the order allowing defendant's motion to suppress stating that the State objected and excepted in apt time to the findings of fact, conclusions of law and ruling and gave notice of appeal to this Court does not meet the conditions set forth in § 15A-979(c). The statutory right of the State to appeal may not be enlarged by the superior court. *State v. Cox*, 216 N.C. 424, 5 S.E. 2d 125 (1939). There is no indication in the record of the present case as to whether the prosecutor certified to Judge Gaines that the appeal was not being taken for the purpose of delay and that the suppressed evidence was essential to the case. Thus we are unable to determine whether the State had a right to appeal the order. We believe that § 15A-979(c) not only requires the State to raise its right to appeal according to the statutory mandate, but also places the burden on the State to demonstrate that it had done so. *Cf. State v. Drakeford*, 37 N.C. App. 340, 246 S.E. 2d 55 (1978) (Article 53 of chapter 15A places the burden on the defendant of demonstrating that he has raised his motion to suppress according to its mandate.)

Because the appeal by the State in this case is not authorized by statute, this Court has no jurisdiction and the appeal must be dismissed.

Dismissed.

Chief Judge MORRIS and Judge WHICHARD concur.

N.C. GRANGE MUTUAL INSURANCE COMPANY AND AMERICAN HAIL
MANAGEMENT, INC. v. THOMAS E. JOHNSON

No. 8010SC787

(Filed 7 April 1981)

Insurance § 140.2— hail policy — other insurance clause

In an action to recover from defendant farmer the amount of a payment made by plaintiffs for hail damage to defendant's crops, there was no merit to

N.C. Grange Ins. Co. v. Johnson

defendant's contention that the court should find either that the "other insurance clause" in the hail insurance policy was void as being against public policy, or that the second policy written by another insurance company should be held void, leaving the first policy in force.

APPEAL by defendant from *Preston, Judge*. Judgment entered 11 June 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 5 March 1981.

In this action the plaintiffs sued the defendant for damages for a claim paid by the plaintiffs to defendant on a policy of hail insurance. The plaintiffs moved for summary judgment. The pleadings and other papers filed in support and opposition to the motion for summary judgment showed that the following facts were not in dispute. The plaintiff, North Carolina Grange Mutual Insurance Company, issued a hail insurance policy to the defendant effective 21 May 1978 covering 70 acres of crops in Surry County. The policy contained the following provision:

OTHER INSURANCE

It is hereby agreed that if other insurance is written on the insured interest in the above described crops this Company will be notified in writing of the amounts of such other insurance, including Federal Crop Insurance Corporation Coverage.

It is further agreed that unless or until so notified of such other insurance the coverage under this policy shall be suspended.

On 7 June 1978 the defendant was issued a hail insurance policy by Fireman's Fund American Insurance Company on 20 acres of the 70 acres which the plaintiff had previously insured with Grange. The defendant did not notify the plaintiffs of the additional coverage. A portion of the 20 acres was damaged by hail and the plaintiffs paid the defendant \$10,340.00 for this loss on 19 July 1975. The plaintiffs sued for the recovery of this payment.

Based on these undisputed facts the court granted the plaintiffs' motion for summary judgment. Defendant appealed.

Young, Moore, Henderson and Alvis, by Walter E. Brock, Jr., for plaintiff appellee.

N.C. Grange Ins. Co. v. Johnson

Franklin Smith for defendant appellant.

WEBB, Judge.

The appellant contends that this Court should either find that the "other insurance clause" in the hail insurance policy is void as being against public policy or that the second policy written should be held void, leaving the first policy in force. The appellant bases his public policy argument on what he contends is the difference between fire insurance coverage and hail insurance coverage. He argues that fire insurance coverage involves a moral hazard, that is, that a person is likely to burn his property to collect the loss if it is overinsured. For that reason, the law allows "other insurance clauses" in fire insurance policies which should not be allowed in hail insurance policies because the insureds cannot control the falling of hail. We do not believe we should hold it is against public policy to prohibit parties to an insurance contract from inserting an "other insurance clause" in the contract if they desire to do so. We decline to hold that an "other insurance clause" in hail insurance policies is against public policy.

The appellant next contends that the second policy written contained an "other insurance clause" identical to the clause in the policy written by Grange. For this reason, the second policy was void ab initio. Since the second policy was void the first policy remained in effect. We believe the contract at issue in the case sub judice contemplated that if the defendant had a second hail insurance policy written on his crop, although that policy was void or voidable and did not notify the plaintiffs of the policy, the coverage on the first policy would be suspended. *See Insurance Co. v. Insurance Co.*, 49 N.C. App. 32, 270 S.E. 2d 510 (1980). There being no policy prohibiting the writing of such a clause, we believe we must enforce it as written.

Affirmed.

Judges HEDRICK and HILL concur.

State v. Coasey

STATE OF NORTH CAROLINA v. DWAYNE L. COASEY

No. 8011SC1105

(Filed 7 April 1981)

1. Robbery § 3 – location of shed – relevancy in robbery case

The location of a shed in which a gun and gloves used in a robbery were found in relation to the residence in which defendant was found was clearly relevant in a prosecution of defendant for armed robbery.

2. Robbery § 4.3– armed robbery – sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for armed robbery where it tended to show that a taxicab driver was robbed of \$20 at gunpoint; after the robbery the driver and an officer tracked the robber through the snow to a shed where they found the gun and gloves used in the robbery; tracks led from the shed to a nearby house; defendant was in the house at this time and identified a pair of wet boots as belonging to him; and another witness testified she had seen defendant sitting in the driver's cab on the morning in question.

APPEAL by defendant from *Brown, Judge*. Judgment entered 16 July 1980 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 13 March 1981.

Defendant was indicted for armed robbery. The State's evidence tended to show that on 1 February 1980, defendant, Dwayne L. Coasey, robbed Paul Creech, a taxicab driver, at gunpoint of approximately \$20 after being driven to Zorrow Valley in Benson, North Carolina.

Mr. Creech testified that after the robbery he and the Benson Chief of Police, Lindell Nordan, tracked the robber through the snow to a shed where they found the gun and cotton gloves used in the robbery and Mr. Creech's leather gloves. Tracks led from the shed to the house of Pearl Williams, which Chief Nordan entered with her permission. The defendant was in the house at this time and identified a pair of wet boots next to the stairway as belonging to him. Chief Nordan then asked Mr. Coasey to step outside and Mr. Creech then identified defendant as the man who robbed him. Mr. Coasey was also identified by Selena Adams, who testified she had seen defendant Coasey sitting in Mr. Creech's cab on the morning in question.

The defendant testified that he did not identify any shoes in the house as being his, he did not get into Mr. Creech's cab and did not point a gun at him.

State v. Coasey

Defendant's motion to dismiss was denied and upon the jury's verdict of guilty as charged, he was sentenced to not less than seven years and not more than twenty years imprisonment. Defendant appealed.

Attorney General Edmisten, by Associate Attorney General Thomas G. Meachum, Jr., for the State.

Corbett & Corbett, by Albert A. Corbett, Jr., for the defendant appellant.

ARNOLD, Judge.

[1] Defendant's first assignment of error is based upon four unrelated exceptions to the admission of evidence at his trial. His first contention is that the testimony of Mr. Creech regarding the location of the shed from the house where Mr. Coasey was found was not relevant as there was no evidence defendant had been in the shed, or evidence that the footprints leading from the shed to the house were made by him.

It is a well-known rule that evidence is relevant if it has any logical tendency to prove a fact at issue in a case. In a criminal case every circumstance that tends to throw light on the supposed crime is admissible. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978); *State v. Pate*, 40 N.C. App. 580, 253 S.E. 2d 266, cert. denied 297 N.C. 616, 257 S.E. 2d 222 (1979). The location of the shed, in which the gun and gloves used in the robbery were found, from the residence in which defendant was found is clearly relevant as measured by the foregoing test.

We have carefully examined the other exceptions within defendant's first assignment of error and find them to also be without merit.

[2] Defendant's second and third assignments of error are that his motions to dismiss were improperly denied by the trial court.

A motion to dismiss in a criminal case requires the court to consider all of the evidence actually admitted, whether competent or incompetent, *State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966), in the light most favorable to the State, giving it the benefit of every reasonable inference fairly drawn therefrom. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). If there is any evidence tending to prove the fact of guilt, or which reasonably

Spruill v. Summerlin

leads to that conclusion, it is for the jury to say whether it is convinced beyond a reasonable doubt of the guilt of the accused. The question, therefore, is whether there is substantial evidence to support a finding that the offense charged has been committed, and that the accused committed it. *State v. Smith, supra.*

When measured by these rules the state's evidence would permit a jury to find that Mr. Creech was robbed by the defendant at gunpoint on 1 February 1980, the evidence is therefore sufficient to carry the case to the jury and defendant's motions to dismiss were properly denied.

No error.

Judges CLARK and MARTIN (Harry C.) concur.

JOYCE TAYLOR SPRUILL v. WILLIAM THOMAS SUMMERLIN AND
McCRARY SAW & TOOL CO., INC.

No. 806DC686

(Filed 7 April 1981)

Automobiles § 80.3- turning into driveway – no contributory negligence

In an action to recover damages sustained in an automobile accident which occurred when defendant attempted to pass plaintiff's vehicle as she turned left into a driveway, evidence did not require the granting of a directed verdict for defendant on the ground of plaintiff's contributory negligence where the evidence tended to show that plaintiff turned onto a highway in a steady rain, traveled approximately 800 feet, allowed a car to pass going in the opposite direction, and attempted to turn left into a driveway; plaintiff began giving a signal of her turn to the left about 500 feet before she reached the driveway; plaintiff saw no other vehicles as she checked her side and rearview mirrors four times in the 800 feet from the place she entered the highway to the driveway; and plaintiff stated that the collision occurred after her front wheels were in the driveway, and when the van driven by defendant, going in the same direction as plaintiff's car, attempted to pass plaintiff on the left.

APPEAL by plaintiff from *McCoy, Judge*. Judgment dated 23 April 1980 in District Court, BERTIE County. Heard in the Court of Appeals 5 February 1981.

Spruill v. Summerlin

Plaintiff instituted this action for damages sustained in an automobile accident when defendant William Summerlin attempted to pass plaintiff's vehicle as she turned left into a driveway. Defendant Summerlin was operating a van owned by defendant McCrary Saw & Tool Co. in the course of his employment with McCrary Saw & Tool.

Plaintiff's evidence tended to show that she made a left turn onto U.S. Highway #13 and drove in a southerly direction. Plaintiff testified that she drove approximately eight hundred feet before reaching the driveway into which she attempted a left turn. Her evidence shows that she slowed down before making the turn into the driveway, in order to allow a vehicle to clear the other lane of traffic, heading in the opposite direction. Plaintiff testified further that she gave an electrical turn signal continuously beginning about five hundred feet before the turn, and checked her side and rearview mirrors four times between the intersection and turn. She saw no traffic behind her prior to her turn, and there was a slight curve between the intersection and driveway. Plaintiff also testified that the accident occurred during a steady rainfall.

At the close of plaintiff's evidence, the defendants made a motion for directed verdict for insufficiency of the evidence to show negligence, or, in the alternative, contributory negligence by plaintiff. The motion was granted, and plaintiff appeals.

Carter W. Jones, by Donnie R. Taylor, for plaintiff appellant.

Gram & Baker, by Ronald G. Baker, for defendant appellees.

ARNOLD, Judge.

We disagree with defendants' position that the evidence as presented by plaintiff and the opinion of this Court in *Cardwell v. Ware*, 36 N.C. App. 366, 243 S.E. 2d 915, *disc. rev. denied*, 295 N.C. 548, 248 S.E. 2d 726 (1978), compelled the granting of a directed verdict on the grounds of plaintiff's contributory negligence as a matter of law.

Plaintiff presented evidence that she turned onto Highway #13 in a steady rain, travelled approximately eight hundred feet, allowed a car to pass going in the opposite direction and attempted to turn left into a driveway. Plaintiff testified that she began giving a signal of her turn to the left about five

Spruill v. Summerlin

hundred feet before she reached the driveway, and that she saw no other vehicles as she checked her side and rearview mirrors four times in the eight hundred feet from the intersection to the driveway. Plaintiff stated that the collision occurred after her front wheels were in the driveway, and when the van driven by defendant Summerlin, going in the same direction as plaintiff's car, attempted to pass plaintiff on the left.

Plaintiff presented ample evidence to take the case to the jury on defendants' negligence. Further, plaintiff's evidence does not show contributory negligence as a matter of law. While G.S. 20-154(a) requires that "[t]he driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety"; subsection (d), added in 1973 provides that "[a] violation of this section shall not constitute negligence per se."

Plaintiff's evidence, when considered in the light most favorable to her, as the non-moving party, raises an inference that defendant was negligent under the prevailing conditions. Because of the steady rain, coupled with plaintiff's testimony concerning her turn signal and use of the mirrors, it may reasonably be inferred that defendant Summerlin was driving at an excessive rate of speed, or failed to keep a proper lookout.

Plaintiff's evidence does not establish that she failed to ascertain that the turn could be made safely and therefore was contributorily negligent as a matter of law; but, rather provides questions for the trier of fact as to whether plaintiff violated G.S. 20-154 and was contributorily negligent. The burden of proving contributory negligence lies with the defendant. *Mintz v. Foster*, 35 N.C. App. 638, 242 S.E. 2d 181 (1978).

Since a violation of G.S. 20-154 is no longer to be considered negligence per se, the jury, if they find as a fact the statute was violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the violator has breached his common law duty of exercising ordinary care.

Mintz v. Foster, 35 N.C. App. at 641-2, 242 S.E. 2d at 184.

Under the facts of this case, the trial judge erred in granting defendants' motion for a directed verdict.

Noell v. Winston

Reversed.

Judges WELLS and HILL concur.

F. LLOYD NOELL v. BARRY T. WINSTON, ADAM STEIN, J. KIRK
OSBORN, LUNSFORD LONG, AND DOUG HARGRAVE

No. 8015SC783

(Filed 7 April 1981)

**Attorneys at Law § 7—deletion of name from indigent defendant appointment list —
failure to state claim for damages**

Plaintiff attorney's allegations that defendant members of a county Bar Association committee had deleted plaintiff's name from indigent defendant appointment lists and that the District Bar had not adopted a plan authorizing defendants to formulate rules for appointment of counsel failed to state a claim for damages based on a denial of due process or trespass against plaintiff's property rights under G.S. 99A-1. Furthermore, where plaintiff failed to raise in his appellate brief the questions of whether this State recognizes the tort of interference with the prospective economic advantage of an attorney or whether his complaint alleges sufficient facts to state such a cause of action, the Court of Appeals will not raise such questions on its own initiative. Appellate Rule 28(a).

APPEAL by plaintiff from *Mills*, *Judge*. Order entered 16 June 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 4 March 1981.

Plaintiff, a licensed attorney practicing in Orange County, filed a complaint alleging that he had received a letter dated 21 November 1979 from defendant Winston advising him that an Orange County Bar Association Committee, of which the individual defendants are members, had deleted plaintiff's name from all lists for appointment of counsel in indigent cases effective 1 December 1979. The plaintiff further alleged that the legislature enacted statutes in 1969 requiring the North Carolina State Bar Council to make rules and regulations relating to the assignment of counsel for indigent defendants (*see* N.C. Gen. Stat. § 7A-459); that pursuant to this statutory authority, the Bar Council adopted such regulations (Appendix VIII of

Noell v. Winston

Volume 4A of the General Statutes); that since the adoption of those regulations, the plaintiff's name has appeared on the attorney list for indigent appointments; that the representation of indigent criminal defendants constituted a substantial part of the plaintiff's law practice; and that the District 15-B Bar has never adopted a plan authorizing the defendants to formulate rules for appointment of counsel. The plaintiff also alleged that the defendants' actions resulted in the plaintiff's name being removed from all appointment lists for indigent defendants; that those actions constituted wrongful and malicious interference with plaintiff's right to pursue the practice of law, were done without any lawful excuse, and were contrary to the North Carolina State Bar Council's rules and regulations; and that those actions have permanently damaged plaintiff's law practice.

Plaintiff sought to recover jointly and severally from the defendants, \$100,000.00 in actual damages, \$500,000.00 in punitive damages, and costs. Defendants moved to dismiss the complaint, pursuant to N.C. Gen. Stat. § 1-1A, Rule 12(b)(6), for failure to state a claim for relief. The court granted that motion and plaintiff appealed.

Graham & Cheshire by Lucius M. Cheshire, for the plaintiff-appellant.

Manning, Fulton & Skinner by Howard E. Manning, for the defendants-appellees.

MARTIN (Robert M.), Judge.

Plaintiff's sole assignment of error is that Judge Mills erred in allowing defendants' motion to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief could be granted. For reasons stated below, we affirm the action of the trial court in dismissing the complaint.

A complaint is sufficient to withstand a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and the allegations contained therein are sufficient to give the defendant sufficient notice of the nature and basis of the plaintiff's claim to enable him to answer and prepare for trial. *Sutton*

Noell v. Winston

v. Duke, 277 N.C. 94, 176 S.E. 2d 161 (1970). For purposes of the motion, the allegations of the complaint must be treated as true. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979).

In their appellate brief, defendants argue that "plaintiff's complaint fails to state a claim for relief in that it pleads no recognized, or even recognizable, cause of action." If there is an absence of law to support a claim of the sort made, the complaint is properly dismissed pursuant to Rule 12(b)(6). *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980).

In his appellate brief, plaintiff attempts to give two theoretical bases for the relief sought: (1) denial of his constitutional right of due process and (2) actionable trespass against plaintiff's property rights under N.C. Gen. Stat. § 99A-1. For neither of these two theories would the facts pleaded support a recovery. Plaintiff did not allege any governmental action. The constitutional provisions guaranteeing due process of law act to prohibit any *state* action which deprives an individual of due process. Likewise, plaintiff has failed to allege any facts which would entitle him to recovery of damages for interference with his property rights under N.C. Gen. Stat. § 99A-1. That statute created a right of action in the owner, his agent or a bailee of stolen property for recovery of damages from one who is criminally guilty of receiving stolen property. *Russell v. Taylor*, 37 N.C. App. 520, 246 S.E. 2d 569 (1978).

We are aware that many jurisdictions recognize a cause of action for interference with a business relationship or expectancy of an attorney, Annot., 26 A.L.R. 3d 679 (1969); 45 Am. Jur. 2d *Interference* § 1, *et seq.* (1969); W. Prosser, Handbook of the Law of Torts § 130 (4th ed. 1971), although we have been unable to find any authority in this State recognizing such a cause of action. Plaintiff has not chosen to raise in his appellate brief the questions of whether this State recognizes the tort of interference with the prospective economic advantage of an attorney or whether his complaint alleges sufficient facts to state such a cause of action, and this Court will not raise such questions on its own initiative. Rule 28(a), N.C. Rules App. Proc.

The order of the trial judge allowing defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is affirmed.

State v. Washington

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. HOWARD WASHINGTON

No. 8010SC747

(Filed 7 April 1981)

1. Attorneys at Law § 7.2- indigent defendant – judgment for counsel fees – absence of notice and hearing

The trial court erred in entering a judgment against the indigent defendant for attorney fees and costs without giving defendant notice and an opportunity to be heard. G.S. 7A-455.

2. Criminal Law §§ 145, 157.1- record on appeal – unnecessary material – costs taxed against counsel

Counsel is taxed with the cost of printing 18 pages in the record on appeal which have no bearing on the issues raised by the appeal. Appellate Rule 9(b)(5).

APPEAL by defendant from *Brannon, Judge*. Judgment entered 25 March 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 6 January 1981.

Defendant was indicted for larceny from the person and misdemeanor assault. State presented evidence that on 25 July 1979 Junior Tucker, Jesse Holloman and Arthur Matthews were walking near the Civic Center in Raleigh, when two black males, one of whom was the defendant, “hollered” to them across the street to ask if they had any “reefer.” The men crossed the street and approached them. Tucker, who was carrying a radio belonging to Matthews, was confronted by defendant who stated, “That’s a nice radio” and then snatched it from Tucker’s hand. Defendant looked at the radio and set it down beside him on the ground.

Jesse Holloman testified that, after defendant took the radio from Tucker, he said, “If you want the radio you got to fight for it.” Defendant walked up to Holloman, saying that he looked like the toughest one, and pushed him in the chest.

State v. Washington

Holloman testified that prior to this he had not struck defendant nor said anything to the defendant. After pushing Holloman, defendant picked up the radio and left with his companion. The three boys immediately contacted the police.

Defendant did not present any evidence.

Defendant's motion for nonsuit was denied. The jury returned a verdict of guilty as charged on both counts and defendant was sentenced to a prison term of four years minimum, six years maximum. He appeals.

Attorney General Edmisten, by Associate Attorney Jane P. Gray, for the State.

Howard & Morelock, by Robert E. Howard, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends the court erred in entering a civil judgment against him granting attorney's fees to the State of North Carolina. We agree. G.S. 7A-455 provides that the court may enter a civil judgment against a convicted indigent for attorney's fees and costs. Our courts have upheld the validity of such a judgment provided that the defendant is given notice of the hearing held in reference thereto and an opportunity to be heard. *State v. Crews*, 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Stafford*, 45 N.C. App. 297, 262 S.E. 2d 695 (1980). Since the record before us contains nothing to indicate that a hearing was held in compliance with the above decisions, we vacate this civil judgment and remand for a hearing on proper notice to the defendant. By our decision we do not reach defendant's argument as to the constitutionality of G.S. 7A-455.

Although we note that defendant now concedes on appeal that he can find no error in the court's denial of his motion for nonsuit, we have carefully reviewed the record and also find no prejudicial error.

[2] The record on appeal contains no less than 18 pages dealing with matters, among which are the court's charge to the jury and defendant's motion for appropriate relief, to which no assignment of error was made and which have no bearing on the issues raised by this appeal. This is in violation of North Carolina Rule of Appellate Procedure 9(b)(5). Counsel will be

State v. Fennell

taxed with the unnecessary printing costs in this case in accordance with Rule 9(b)(5). *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Minshew*, 33 N.C. App. 593, 235 S.E. 2d 866 (1977).

In the criminal conviction we find no error.

The civil judgment is vacated and remanded.

Judges WELLS and HILL concur.

STATE OF NORTH CAROLINA v. JOSEPH DANIEL FENNELL

No. 805SC1055

(Filed 7 April 1981)

APPEAL by defendant from *Llewellyn, Judge*. Order entered 24 April 1980 in Superior Court, NEW HANOVER County. Heard in Court of Appeals 10 March 1981.

Defendant was charged in a proper bill of indictment with armed robbery. Upon defendant's plea of guilty, judgment was imposed on 22 April 1980 by Judge Llewellyn. On 23 April 1980, defendant filed a motion for appropriate relief seeking to withdraw his plea of guilty. This motion contained the following pertinent allegations:

a. That prior to and at the time of the entering of his plea of guilty and at the time of sentencing, he was scared and that this condition influenced and overwhelmed him to the extent that he entered a plea of guilty when in fact his knowing and intelligent choice would have been to enter a plea of not guilty.

b. That prior to and at the time of sentencing, he was unskilled in matters of law and that had he been skilled in matters of law, his knowing and intelligent choice would have been to plead not guilty.

c. That his attorney told him that it had been indicated to said attorney that he would likely receive a minimum sentence of approximately fifteen (15) years if he pleaded guilty to the charge of armed robbery and that in fact he received a minimum sentence of eighteen (18) years.

State v. Fennell

d. That he was advised by his attorney that there was a strong possibility or probability that he would receive a life sentence in the event he were tried by a jury and found guilty of the crime of armed robbery.

e. That he only has a ninth grade education and is deficient in his ability to read and write.

f. That he has been "rift-rafterd."

g. That there are other matters which he may present to the Court at the hearing on this Motion and that the Defendant wishes to testify on his own behalf at such hearing.

Defendant also filed an affidavit in support of this motion, which repeated the pertinent allegations set out in the motion. After a closed hearing on the motion, Judge Llewellyn made the following findings:

1. That the Defendant was present in Court represented by MR. HERBERT SCOTT and MR. WILLIAM B. HARRIS, III.

2. That evidence was presented by the Defendant in the form of testimony of the Defendant-Petitioner.

3. That the Court had an opportunity to view the witness and weigh the credibility of the witness.

4. That the Defendant pled guilty to armed robbery on the 22nd day of April, 1980 before the undersigned Judge.

5. That the plea was given after a Transcript of Plea was taken from the Defendant under oath.

6. That after the answers were given to the questions on the Transcript of Plea, the Defendant was sworn as to his answers, which oath contained the affirmation that neither his lawyer or anyone else had told him to give false answers in order to have the court accept his plea, and that the Court heard the evidence presented by the State and by the Defendant. That the Court found a factual basis for the entry of the plea, that the Defendant was satisfied with his lawyer, and the plea was given understandingly, knowingly and voluntarily.

State v. Fennell

7. Upon further review of the Record, the Court finds that a transcript of the trial is not necessary for a proper determination of this matter.

8. That the Bill of Indictment upon which the Defendant pled guilty was valid.

9. That the Petitioner was represented by competent counsel, WILLIAM B. HARRIS, III, who afforded him effective representation throughout the proceedings.

10. That the Defendant, upon presentation of the evidence in the sentencing hearing, testified under oath that he entered the place of business which was robbed with a gun and ordered the employee located therein to hand over the money, forcing her to lie on the floor, took the money, exited the store, and upon exiting the store, fired a shot into the store.

11. That the Defendant was apprehended on the same evening in the same city, at which time a Llama .22 automatic pistol was found in his automobile, which automobile was described to the Police as the vehicle used in the armed robbery.

Judge Llewellyn then concluded that there was no factual basis for the allegations in defendant's motion and that defendant "had a fair and impartial trial and none of his constitutional or legal rights were denied or violated in any respect before, during, or after his plea." From an order denying defendant's motion for appropriate relief, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Newton, Harris & Shanklin, by William B. Harris III, for the defendant appellant.

HEDRICK, Judge.

Although defendant stated in his motion for appropriate relief that it was made pursuant to G.S. §§ 15A-1414, 1415, he did not specify the grounds therefor. It appears from the allegations in his motion and his affidavit filed in support thereof that defendant attempted to allege that his plea of guilty was not knowingly, voluntarily, and understandingly entered. Defend-

State v. Fennell

ant thus would appear to have stated grounds under G.S. § 15A-1415(b)(3) and would be entitled to appeal the denial of his motion to withdraw his plea of guilty pursuant to G.S. § 15A-1444(e).

Defendant's sole exception is to the order denying his motion. A broadside exception to an order by the trial court denying a motion relating to one of the defendant's protected rights presents for review only the question of whether the facts found and the conclusions made support the order. *See State v. McKinney*, 19 N.C. App. 177, 198 S.E. 2d 241 (1973). We have carefully reviewed Judge Llewellyn's order dated 24 April 1980, and find his order to be properly supported by the facts found and the conclusions made.

The order appealed from is

Affirmed.

Judges WEBB and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 APRIL 1981

ARMSTRONG SUPPLY CORP. v. COKER HEATING & AIR COND. No. 8029DC712	Henderson (79CVD187)	Dismissed
BEAKEY v. BEAKEY No. 8010DC799	Wake (78CVD5093)	Affirmed
FLIEHR v. INDIAN TRAIL AIR SERVICE No. 8026SC814	Mecklenburg (77CVS8686)	No Error
GILBERT ENGINEERING v. PORTER No. 8022SC675	Iredell (78CVS00672)	Appeal Dismissed
GILLIAM v. HOLDEN No. 809SC751	Franklin (79CVS338)	Reversed & Remanded
HALL v. DONCASTER COLLAR & SHIRT CO. No. 8010IC775	Industrial Commission (G-5949)	Appeal Dismissed
HILL v. HILL No. 8026DC729	Mecklenburg (77CVD4831)	Affirmed
IN RE HALE No. 8027DC1075	Gaston (79J25)	Affirmed
IN RE LEAKAN No. 8026DC1092	Mecklenburg (79J391)	Affirmed
JARRATT v. JARRATT No. 8020DC703	Moore (79CVD228)	Affirmed
POTTER v. POTTER No. 8023DC791	Wilkes (79CVD1261)	No Error
POTTS v. ELLIS No. 8022DC768	Davie (79CVD136)	Modified & Affirmed
STATE v. ARTHUR N. 8017SC890	Rockingham (79CR14107) (79CR14108) (79CR14109) (79CR14325)	No Error

STATE v. BARNETT N. 809SC1062	Granville (80CRS651) (80CRS652) (80CRS653) (80CRS654) (80CRS655)	No Error
STATE v. BETHEA No. 8011SC1033	Lee (79CRS7986)	No Error
STATE v. DUNLAP No. 8020SC868	Richmond (79CRS167) (78CRS8739) (80CRS907)	No Error
STATE v. EDWARDS No. 803SC1057	Craven (80CRS4385)	No Error
STATE v. FLEMING No. 8029SC1054	Rutherford (80CRS2029)	Affirmed
STATE v. FRODGE No. 8020SC1019	Union (80CRS2180)	No Error
STATE v. GARRETT No. 808SC1004	Lenoir (80CR3394)	No Error in Trial Judgment is Modified & Affirmed
STATE v. HARRISON No. 803SC1018	Craven (78CR3975)	Affirmed
STATE v. HUNT No. 8016SC943	Robeson (79CR26306)	No Error
STATE v. MATTHEWS No. 8011SC906	Harnett (79CRS11228) (80CRS1837)	No Error
STATE v. MERCER No. 807SC1009	Edgecombe (80CR2033)	No Error
STATE v. SMITH No. 802SC872	Beaufort (79CRS9440)	No Error
STATE v. TONEY No. 8026SC1090	Mecklenburg (80CRS4888)	No Error
STATE v. YOUNG No. 8026SC1086	Mecklenburg (79CRO72318) (80CRO21474)	No Error

Shugar v. Guill

GILBERT SHUGAR v. H.L. GUILL**No. 807SC562****(Filed 21 April 1981)****1. Damages § 11.1– punitive damages – when recoverable**

Punitive damages are recoverable in tort actions only where there are allegations and proof of facts showing some aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and willful wrong, insult, indignity or a reckless or wanton disregard of plaintiff's rights.

2. Damages § 12.1– punitive damages – insufficiency of complaint

Plaintiff's complaint alleging that "the defendant, without just cause, did intentionally, willfully and maliciously assault and batter the plaintiff" was insufficient to state a claim for punitive damages since it failed sufficiently to apprise defendant of the facts which plaintiff contended constituted aggravating circumstances entitling him to an award of punitive damages.

3. Damages § 12.1– pleading punitive damages

When a plaintiff's complaint alleges torts other than fraud or torts that, by their very nature, encompass elements of aggravation, his pleading must allege sufficient facts to place his opponent on notice of the aggravating factors extrinsic to the tort itself from which he derives his claim for punitive damages.

4. Damages § 12.1– punitive damages – assault and battery – necessity for pleading aggravating factors

The torts of assault and battery do not by their very nature contain elements of aggravation so that those torts would give rise to a claim for punitive damages without the pleading of additional elements of aggravation.

5. Assault and Battery § 2– justification for assault and battery – jury question

In an action to recover damages allegedly resulting from an assault and battery committed upon plaintiff by defendant, plaintiff's evidence did not establish the defense of justification as a matter of law but presented a jury question as to whether plaintiff gave defendant reasonable grounds to justify plaintiff's ejection from defendant's restaurant where it tended to show that the parties had a dispute over defendant's failure to pay for a piece of formica which plaintiff had permitted a carpenter to use in performing work for defendant; plaintiff went to defendant's restaurant, obtained a cup of coffee, and told defendant to charge it against the amount defendant owed for the formica; plaintiff and defendant engaged in an argument and defendant told plaintiff to leave his restaurant; plaintiff refused to leave and defendant grabbed plaintiff in a bear hug, picked him up, and started moving him toward the restaurant door; plaintiff and defendant exchanged blows; and when a bystander tried to stop the fight, plaintiff dropped his hands, and defendant then struck plaintiff squarely in the face.

Shugar v. Guill

6. Assault and Battery § 2— basis of dispute between parties – provocation in mitigation of damages

In an action to recover damages allegedly resulting from an assault and battery committed upon plaintiff by defendant in which the evidence showed that one basis for a dispute between the parties at the time in question was defendant's failure to pay for a piece of formica which plaintiff permitted a carpenter to use in performing work for defendant, testimony by the carpenter concerning the formica was relevant to show provocation in mitigation of plaintiff's compensatory damages, and the trial court erred in limiting the jury's consideration of such testimony to the question of mitigation of punitive damages.

Judge VAUGHN concurring in part and dissenting in part.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 8 February 1980 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals on 23 January 1981.

Plaintiff seeks to recover compensation and punitive damages allegedly resulting from an assault and battery committed upon plaintiff by defendant.

Defendant's pretrial motion to dismiss plaintiff's claim for punitive damages on the ground that plaintiff failed properly to plead that claim was denied.

The evidence presented at trial tended to show the following: In March of 1978, Bobby Long, who had done carpentry work for both plaintiff and defendant, asked plaintiff if he could have a portion of a sheet of formica he knew to be in plaintiff's possession so that he could complete some remodeling work which he was doing for defendant. Mr. Long had just completed a job for plaintiff, and he knew the sheet of formica was left over from that job. Plaintiff allowed Mr. Long to use the piece of formica he had requested. Subsequently, on two different occasions, plaintiff billed defendant for \$6.25, the price of the piece of formica. These bills went unpaid. Plaintiff's secretary contacted defendant by telephone with regard to the overdue bill, but payment did not result. Plaintiff did not pursue the matter any further. The question of payment for this piece of formica subsequently became a "sore subject" between plaintiff and defendant.

On 19 October 1978, at approximately 9:25 a.m., plaintiff entered Cotton's Grill. This restaurant was owned and operated by defendant. It was the habit of a group of local businessmen to meet at the restaurant for a coffee break. Several acquaint-

Shugar v. Guill

tances of both plaintiff and defendant were seated at a table with defendant when plaintiff arrived at the grill. Plaintiff walked to the coffee urn and served himself a cup of coffee. He then proceeded to join his friends and defendant at their table. On the way to the table plaintiff passed the cash register, but he did not leave payment for the coffee on the register because he did not have the correct change. The four seats at the table were already occupied, so plaintiff pulled up a chair at one of the corners for himself, with defendant seated to his right. As he sat down plaintiff said to defendant, "[t]his cup of coffee is on the house." Defendant made some reply to plaintiff's remark, to which plaintiff responded by saying, "[c]harge it against the formica you owe for." Further argumentative remarks were exchanged between the two. Finally, defendant accused plaintiff of being "cheap" and ordered plaintiff to get out of his restaurant. Plaintiff responded by saying "make me." Then defendant, who was a large man, reached around and grabbed plaintiff in a bear hug, picked him up, and started moving him toward the restaurant door. Before reaching the door, plaintiff was able to free himself from defendant's grip. After plaintiff freed himself, he and defendant exchanged blows. A bystander, Louis Perry, tried to intervene and stop the fight. Plaintiff, thinking the struggle was at an end, dropped his hands. Defendant then struck plaintiff squarely in the face. This blow broke plaintiff's nose and caused it to bleed profusely.

Plaintiff's nose was peculiarly sensitive. As a child, he had suffered from a deviated septum which condition had required four operations.

After being struck in the nose plaintiff lost consciousness for a brief period. He was helped to a chair and wet towels were applied to his face. Plaintiff soon recovered sufficiently to leave the restaurant unaided. The entire incident lasted approximately 60 seconds.

Plaintiff was examined that morning by a Tarboro physician who referred him to the specialist in Greenville, North Carolina, who treated him. His nose was straightened, packed, and bandaged. This was a very painful procedure. As a result, plaintiff experienced some loss of breathing capacity. His medical expenses totalled \$234.

Shugar v. Guill

The jury returned a verdict in plaintiff's favor. They awarded plaintiff \$2000 in compensatory damages and \$2500 in punitive damages. The court entered its judgment in like amounts. Defendant appealed from this judgment.

Fields, Cooper, and Henderson, by Milton P. Fields, for plaintiff appellee.

Bridgers and Horton, by Edward B. Simmons, for defendant appellant.

MORRIS, Chief Judge.

We first examine the questions relating to punitive damages. Defendant made motions, prior to trial, at the close of plaintiff's evidence, and at the close of all the evidence to dismiss plaintiff's claim for punitive damages on the grounds that plaintiff had failed properly to plead or to prove that claim. In each instance the court denied defendant's motion to dismiss. At the close of the trial, the court submitted the issue of punitive damages to the jury, and the jury awarded plaintiff \$2500 on that issue.

[1] Punitive damages are recoverable only in tort actions where there are allegations and proof of facts showing some aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and willful wrong, insult, indignity or a reckless or wanton disregard of plaintiff's rights. *VanLeuven v. Motor Lines*, 261 N.C. 539, 135 S.E. 2d 640 (1964); *Hinson v. Dawson* 244 N.C. 23, 92 S.E. 2d 393 (1956); *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955). In order for a plaintiff to collect punitive damages there must be some additional element of a social behavior which goes beyond the facts necessary to create a simple case of tort.

[2] In this case we are asked to determine whether the allegations of punitive damages contained in plaintiff's pleading were sufficient to withstand defendant's motion to dismiss. We think not.

Plaintiff's complaint reads, in its entirety, as follows:

COMPLAINT

Shugar v. Guill

The plaintiff, complaining of the defendant, alleges and says as follows:

1. The plaintiff and defendant are both citizens and residents of Edgecombe County, North Carolina.
2. That on or about the 19th day of October, 1978, the defendant, without just cause, did intentionally, willfully and maliciously assault and batter the plaintiff, inflicting upon him serious and permanent personal injuries thereby causing him to suffer both in body and in mind and that he did aggravate a preexisting injury which has caused the plaintiff additional mental anguish and suffering.
3. Plaintiff has incurred medical bills in an amount not yet determined and he is informed and believes and so alleges that additional expenses will be forthcoming in the future.

WHEREFORE, the plaintiff prays the Court that he have and recover of the defendant the amount of \$25,000 as actual damages and the amount of \$50,000 as punitive damages, together with the costs of this action.

Plaintiff's only reference in this pleading with regard to his claim for punitive damages consisted of the statement: "the defendant, without just cause, did intentionally, willfully and maliciously assault and batter the plaintiff. . . ." This statement standing alone, without further facts to support it, states a mere conclusion of the plaintiff. It fails sufficiently to apprise defendant of the facts which plaintiff contends constitute aggravating circumstances entitling him to an award of punitive damages. A mere conclusory statement that the wrongful act was advanced in a malicious, wanton, or willful manner is insufficient. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968), *appeal after remand*, 6 N.C. App. 708, 171 S.E. 2d 87 (1969); *Cook v. Lanier*, 267 N.C. 166, 147 S.E. 2d 910 (1966); *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955); *Development Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 228 S.E. 2d 72 (1976); 25 C.J.S., *Damages*, § 133, p. 1192-93; 22 Am. Jur. 2d, *Damages*, § 293, p. 389; 5 Strong, N.C. Index, *Damages*, § 12.1, p. 33; 1 McIntosh, N.C. Practice 2d, § 1079 (4).

The rule with regard to the necessary sufficiency of the pleading of punitive damages was discussed by Justice Lake in

Shugar v. Guill

Clemmons v. Insurance Co., *supra*. There he stated the rule as follows:

In *Lutz Industries, Inc. v. Dixie Home Stores*, *supra*, this Court held that allegations in a complaint, designed to support an award of punitive damages, were insufficient for that purpose. The allegation in question was: "That by reason of the unlawful, wanton, wilful and gross negligent conduct of the defendant corporation and its agents and their failure to observe the rules and requirements of the National Electrical Code, and failure to observe the ordinance of the City of Lenoir, that this plaintiff is entitled to recover punitive damages of the defendant corporation in the amount of \$50,000." Speaking through Parker, J., now C.J., this Court said that this paragraph of the complaint "merely states conclusions, not facts, and * * * should be stricken."

Since it is not sufficient, in order to allege a basis for an award of punitive damages, to allege merely that conduct of the defendant's employee was "wanton, wilful and gross," it follows that the insertion in the complaint of such adjectives is not essential to raise an issue of an award for punitive damages. The question is whether the facts alleged in the complaint are sufficient to show the requisite malice, oppression or wilful wrong. As Parker, J., now C.J., said in *Lutz Industries, Inc. v. Dixie Home Stores*, *supra*: "While it seems that punitive damages need not be specifically pleaded by that name in the complaint, it is necessary that the facts justifying a recovery of such damages be pleaded. 25 C.J.S., p. 758. Though no specific form of allegation is required, the complaint must allege facts showing the aggravating circumstances which would justify the award, for instance, actual malice, or oppression or gross and wilful wrong, or a wanton and reckless disregard of plaintiff's rights."

274 N.C. at 424, 163 S.E. 2d at 767.

The reasoning of the Supreme Court in *Lutz* and *Clemmons* bears directly upon the facts of the case before us on appeal. We are bound to follow the precedent of those decisions. Therefore, we must hold that the plaintiff's pleading in the instant case did not sufficiently allege punitive damages, and defendant's mo-

Shugar v. Guill

tion to dismiss the claim for punitive damages should have been granted.

We are mindful that the authorities we have cited predate the new Rules of Civil Procedure which became effective in North Carolina in 1970. However, we think that even under the new Rules the reasoning of these authorities should still obtain with regard to the pleading of punitive damages. Under the former practice a pleader had to be more concerned about setting forth sufficient facts to give the opposing party proper notice and to cover all of the essential elements of the action.

Under "notice pleading" a statement of a claim is adequate if it gives sufficient notice of the claim asserted "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161.

Roberts v. Memorial Park, 281 N.C. 48, 56, 187 S.E. 2d 721, 725 (1972).

Unlike punitive damages, compensatory damages are the natural and probable result of the wrongful acts complained of. They arise out of the tort which is the basis of the action. Such natural consequences of the wrongful act need not be pleaded in detail simply because the opponent of the pleading party has been placed on notice of them by being placed on notice of the underlying tort.

Punitive damages, on the other hand, are not awarded as compensation, but they are awarded above and beyond actual damages in proper instances as punishment when it appears that the wrongful act was done maliciously, willfully, wantonly, or in reckless disregard of the plaintiff's rights. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975); *Cavin's Inc. v. Insurance Co.*, 27 N.C. App. 698, 220 S.E. 2d 403 (1975). Punitive damages arise out of the acts or intentions of the tort-feasor which contain any of the elements of aggravation. Punitive damages do not arise automatically from the commission of the tort, but rather they arise from one of the aggravating factors extraneous to the tort. If facts merely necessary to apprise the defendant of the wrongdoing with which the plaintiff's complaint charges him are all that are pleaded, this will not provide the defendant with

Shugar v. Guill

the notice to which he is entitled to prepare a responsive pleading or prepare for trial on the issue of punitive damages. Defendant is entitled to some notice from plaintiff's complaint of the extraneous facts from which plaintiff's claim for punitive damages arise. Therefore, we think that under the present system of "notice pleading" plaintiff must do more than make the conclusory allegation that, "defendant, without just cause, did intentionally, willfully and maliciously assault and batter the plaintiff." Plaintiff must allege some facts in his complaint tending to establish one or more of the aggravating factors in order to recover punitive damages.

Plaintiff takes the position that the Supreme Court modified its prior decisions in regard to the pleading of punitive damages in *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Plaintiff contends that in *Newton* the Supreme Court held that the aggravating conduct necessary for an award of punitive damages need not be alleged in the complaint if allegations sufficient to allege the tort, where that tort, by its very nature, encompasses any of the elements of aggravation, are made in the complaint.

We do not think that the Supreme Court intended that its decision in *Newton* be given the broad interpretation urged on us by plaintiff. Rather, we think the better interpretation of *Newton* is to limit its application with regard to the pleading of punitive damages to the tort of fraud.

Plaintiff's action in *Newton* was based in contract. Plaintiff contended that the defendant-insurer had committed acts sufficient to warrant an award of punitive damages by failing to pay the plaintiff's claim for loss by theft and burglary when defendant-insurer knew that the loss had placed plaintiff in a precarious financial position. The Supreme Court held that the trial court properly dismissed the plaintiff's claim for punitive damages, because the loss complained of arose from the alleged breach of contract. The breach of contract represented by defendant-insurer's failure to pay was not alleged to have been accompanied by fraud or any other recognizable tortious behavior. Punitive damages are not awarded in contract actions. Plaintiff's allegations of defendant-insurer's oppressive behavior standing alone were insufficient to show an accompanying tort.

Shugar v. Guill

Ancillary to its upholding of the trial court's dismissal of the claim for punitive damages, the Supreme Court in its discussion held that the tort of fraud itself would give rise to a claim for punitive damages without the pleading of additional elements of aggravation. *Newton* indicates that if the tort of fraud is sufficiently alleged in the complaint there is no necessity to allege extraneous aggravating factors in order to seek an award of punitive damages.

Justice Exum, speaking for the Court, illustrated this point as follows:

Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed. *Oestreicher v. Stores, supra*; *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). Such aggravated conduct was early defined to include "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness. . . ." *Baker v. Winslow, supra, citing Holmes v. R.R.*, 94 N.C. 318 (3 Davidson) (1886).

The aggravated conduct which supports an award for punitive damages when an identifiable tort is alleged may be established by allegations of behavior extrinsic to the tort itself, as in slander cases. *Cf. Baker v. Winslow, supra; Cotton v. Fisheries Products Co.*, 181 N.C. 151, 106 S.E. 487 (1921). Or it may be established by allegations sufficient to allege a tort where that tort, *by its very nature*, encompasses any of the elements of aggravation. Such a tort is fraud, since fraud is, itself, one of the elements of aggravation which will permit punitive damages to be awarded. *See Saberton v. Greenwald, supra*, which allowed punitive damages for a fraudulent representation that induced the plaintiff to buy an old watch in a new case.

In North Carolina, actionable fraud *by its very nature* involves intentional wrongdoing. As defined by Justice, now Chief Justice, Sharp in *Davis v. Highway Commission*, 271 N.C. 405, 408, 156 S.E. 2d 685, 688 (1967): "Fraud is a malfeasance, a positive act resulting from a wilful intent to deceive. . . ." *quoting Walter v. State*, 208 Ind. 231, 241, 195 N.E. 268, 272, 98 A.L.R. 607, 613; 37 C.J.S. Fraud § 1. The

Shugar v. Guill

punishment of such intentional wrongdoing is well within North Carolina's policy underlying its concept of punitive damages. Insofar as *Swinton v. Realty Co.*, *supra*, requires some kind of aggravated conduct in addition to actionable fraud or makes any distinction between "simple" and "aggravated" fraud, permitting punitive damages only for the latter, that case is overruled, as are all cases so holding.

Newton v. Insurance Co., 291 N.C. 105, 112-114, 229 S.E. 2d 297, 301-02 (1976).

[3] Justice Exum's reasoning in *Newton* strongly indicates by implication that the Supreme Court intended to continue to follow the general rules of pleading punitive damages as laid down in *Cook*, *Clemmons*, and *Lutz*, *supra*, in cases involving torts other than fraud or torts that, by their very nature, encompass any of the elements of aggravation. The Court chose to restrict its holding to actionable fraud and to leave intact the general rule. When a plaintiff's complaint alleges torts other than those excepted in *Newton*, his pleading must allege sufficient facts to place his opponent on notice of the aggravating factors extrinsic to the tort itself from which he derives his claim for punitive damages.

[4] Plaintiff argues that the torts of assault and battery by their very nature contain elements of aggravation bringing them within the *Newton* exception to the general rule of pleading punitive damages. We disagree. The essential elements of actionable fraud are a material misrepresentation of past or existing fact; the making of it with knowledge of its falsity or in culpable ignorance of its truth; the misrepresentation is made with the intention that it should be acted upon; and it is acted upon by the recipient to his damage. *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131 (1953); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E. 2d 63 (1979). Obviously, fraud must always consist of an intentional and willful positive act by the wrongdoer. This is not necessarily so in the case of assault and battery. An assault is an offer to show violence to a person without actually striking him, and a battery is the actual infliction of the blow without the consent of the person who receives it. *Hayes v. Lancaster*, 200 N.C. 293, 156 S.E. 530 (1931). An assault and battery need not necessarily be perpetrated with the maliciousness, willfulness, or wantonness needed for the recovery of punitive damages.

Shugar v. Guill

For the purpose of determining whether punitive damages should be allowed, the word "malice" means that the act done must have been done without right or justifiable cause. *Smith v. Ice Co.*, 159 N.C. 151, 74 S.E. 961 (1912). "Malice as used in reference to exemplary damages is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." 22 Am. Jur. 2d, Damages, § 250, p. 341. Similarly, "The terms 'recklessness,' 'wantonness,' and 'willfulness' imply a knowledge and present consciousness that injury must result from a wrongful act done or from a duty omitted. . . . It is, therefore apparent that the intention and the motives with which the act was done are always material and should be inquired into. It follows, further, that exemplary damages are not authorized where a tort is committed unintentionally, through mistake or ignorance, or under duress. . . . Nor can exemplary damages be recovered where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, or where he resists the forcible and unlawful acts of another, unless he is guilty of excess and acts from motives of malice." 22 Am. Jur. 2d, Damages, § 253, p. 346-47. Considering these definitions of the elements of aggravation, it would certainly be possible for the wrongful acts of assault and battery to occur unaccompanied by the aggravating factors. For example, the assault and battery could occur unintentionally, or they could occur following some form of provocation. Therefore, we are of the opinion that the rule of *Newton* does not include this tort.

We are aware of the case of *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), in which Justice Brock speaking for the Court stated:

The requirement that there be some element of aggravation to the tortious conduct before punitive damages will be allowed is also met by the allegations of plaintiff's complaint. "Such aggravated conduct was early defined to include 'fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness . . . ' *Baker v. Winslow* citing *Holmes v. R.R.*, 94 N.C. 318 (3 Davidson) (1886)." *Newton, supra*, at 112, 229 S.E. 2d at 301. Plaintiff here alleges

Shugar v. Guill

that defendant acted wilfully, maliciously, recklessly, and with full knowledge of the consequences which would result from his conduct. She is entitled to have at least the opportunity to prove those allegations.

297 N.C. at 199, 254 S.E. 2d at 623.

We think it was the intention of the Court that this language apply only to the circumstances of this particular case. Prior to this assertion, Justice Brock in the same opinion stated:

The general rule as it has often been stated in the opinions of this Court is that punitive damages are not recoverable for breach of contract with the exception of breach of contract to marry. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *King v. Insurance Co.*, 273 N.C. 396, 159 S.E. 2d 891 (1968). But when the breach of contract also constitutes or is accompanied by an identifiable tortious act, the tort committed may be grounds for recovery of punitive damages. *Newton v. Insurance Co.*, *supra*. Our recent holdings in this area of the law clearly reveal, moreover, that allegations of an identifiable tort accompanying the breach are insufficient alone to support a claim for punitive damages. In *Newton* the further qualification was stated thusly: "Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Newton*, *supra*, at 112, 229 S.E. 2d at 301. See Comment, *Remedies—"Extra-Contractual" Remedies for Breach of Contract in North Carolina*, 55 N.C.L. Rev. 1125 (1977).

297 N.C. at 196, 254 S.E. 2d at 621.

This reinforces our belief that the Supreme Court did not intend in either *Newton* or *Stanback* to hold that in all cases the pleading of only the conclusions that a wrongful act was committed in a malicious, willful or wanton manner be sufficient to allege punitive damages.

Similarly, we think the facts of *Hendrix v. Guin*, 42 N.C. App. 36, 255 S.E. 2d 604 (1979), distinguish our holding in that

Shugar v. Guill

case from our decision in the instant case. In *Hendrix* this Court stated:

Plaintiff also alleges that the conduct of defendant constitutes "a willful, wanton, malicious, reckless, wrongful, rude and forcible trespass to plaintiff's rightful possession of the apartment." These allegations, if supported by evidence to the satisfaction of the jury, would permit the jury to consider an award of punitive damages. (Citations omitted.)

42 N.C. App. at 39, 255 S.E. 2d at 606. Plaintiff's complaint, excerpts of which appear in our opinion in *Hendrix*, show that the plaintiff alleged sufficient facts in his pleading to give the defendant adequate notice of the requisite aggravating factors.

In the instant case, plaintiff's complaint contains no allegations of fact whatsoever to place defendant on notice of any extraneous acts that could form the basis of the claim for punitive damages. Therefore, we find that the trial court's denial of defendant's pretrial motion to dismiss plaintiff's claim for punitive damages was improper, and we vacate the portion of the trial court's judgment with respect thereto.

[5] Defendant assigns error to the court's denial of his motions for directed verdict and for judgment notwithstanding the verdict. Defendant contends that plaintiff's evidence established a legal justification for the alleged assault and battery. He argues that under certain conditions a proprietor such as he has a legal right to eject a guest. "[T]he proprietor of a public house has a right to request a person who visits it, not as a guest or on business with guests, to depart, and if he refuse, the innkeeper has a right to lay his hands gently on him and lead him out, and if resistance be made, to employ sufficient force to put him out. For so doing, he can justify his conduct on a prosecution for assault and battery." *State v. Steele*, 106 N.C. 766, 784, 11 S.E. 478, 485 (1890), citing Wharton (1 Crim. Law, § 625); see *Hutchins v. Durham*, 118 N.C. 457, 24 S.E. 723 (1896).

The issue in the instant case as to the defense of justification becomes whether plaintiff gave defendant reasonable grounds to justify plaintiff's ejection from the restaurant. We do not think that under the evidence presented defendant has established the defense of justification as a matter of law. Clearly, we think that this was a matter for the jury.

Shugar v. Guill

[6] Finally, defendant contends that the trial court erred in several portions of its instructions to the jury. First, defendant urges that the trial court should not have instructed the jury to limit its consideration of the testimony of the carpenter Bobby Long to the question of mitigation of punitive damages. Long testified that in January or February of 1978 he was employed by both plaintiff and defendant to do some carpentering and cabinet work. He needed a small piece of formica to finish defendant's job. Long knew plaintiff had such a piece of formica. He contacted plaintiff, and asked if he could use the formica. Plaintiff assented. Plaintiff and Long did not discuss whether or how the price of the piece of the formica was to be charged to the defendant. He and plaintiff never discussed whether defendant would be responsible for the formica. Long testified that plaintiff had not mentioned the formica to him since, nor had he billed him for it. At the conclusion of Long's testimony the trial court instructed the jury that his testimony was to be considered only on the issue of punitive damages and for no other purpose.

Although provocation is not a defense to an action for assault, provocation can be considered in mitigation of plaintiff's damages. *Lewis v. Fountain*, 168 N.C. 277, 84 S.E. 278 (1915); *Frazier v. Glasgow*, 24 N.C. App. 641, 211 S.E. 2d 852, cert. denied, 286 N.C. 722, 213 S.E. 2d 721 (1975). Defendant's use of plaintiff's piece of formica formed one of the bases of the dispute which erupted between plaintiff and defendant on the morning this incident occurred. Long's testimony furnished the jury with an understanding of the background concerning this disagreement. Therefore, this testimony was relevant to the issue of provocation and the jury should have been allowed to consider it in mitigation of plaintiff's compensatory damages. We think this error entitles defendant to a new trial on the issue of compensatory damages.

Having reached this determination, we find it unnecessary to consider defendant's remaining assignments of error, all of which are directed to the court's instructions to the jury. Accordingly, the judgment of the trial court is vacated with respect to its award of punitive damages and reversed on the issue of compensatory damages. The matter is remanded to the trial court for a new trial on that issue.

Smith v. American and Efird Mills

Judge BECTON concurs.

Judge VAUGHN concurs in part and dissents in part.

Judge VAUGHN concurring in part and dissenting in part.

I agree that evidence of provocation can be considered in mitigation of compensatory damages as well as punitive damages.

I dissent, however, from the holding that the complaint fails to state a claim upon which punitive damages may be awarded. I believe the allegation

that on or about the 19th day of October, 1978, the defendant, without just cause, did intentionally, willfully and maliciously assault and batter the plaintiff, inflicting upon him serious and permanent personal injuries thereby causing him to suffer both in body and in mind and that he did aggravate a preexisting injury which has caused the plaintiff additional mental anguish and suffering

is sufficient to notify defendant of the facts which plaintiff contends constitute aggravating circumstances entitling him to the award of punitive damages he seeks in his prayer for relief.

SPURGEON W. SMITH, EMPLOYEE, PLAINTIFF v. AMERICAN AND EFIRD
MILLS, EMPLOYER, AND AETNA LIFE & CASUALTY INSURANCE
COMPANY, CARRIER, DEFENDANTS

No. 8010IC965

(Filed 21 April 1981)

1. Master and Servant § § 69, 94— workers' compensation — total and permanent disability following partial disability — additional compensation proper

Where all the evidence tended to show that plaintiff became totally and permanently disabled in 1978, but the Industrial Commission did not find as a fact that plaintiff was so disabled, the case must be remanded for a finding of fact on the issue of whether, and if so when, plaintiff became totally and permanently disabled. If the Commission should find that plaintiff became totally and permanently disabled, plaintiff's compensation should be to the fullest extent allowed under G.S. 97-29 and should be awarded without

Smith v. American and Efird Mills

regard to compensation previously awarded plaintiff under G.S. 97-30 for partial disability; however, a plaintiff should receive full compensation under G.S. 97-29 only where an award under G.S. 97-30 was fully paid *before* plaintiff became totally disabled, since, if the period for partial disability award overlapped the period for the total award, the stacking of total benefits on top of partial benefits, for the same time period, would allow plaintiff a greater recovery than the legislature intended.

2. Master and Servant § 68—workers' compensation – partial disability followed by total disability – compensation for total disability – applicable statute

Plaintiff should be compensated for his permanent and total disability under G.S. 97-29 as it read in 1978 when his disability became permanent and total, rather than as it read in 1970 when he first became disabled and was entitled to compensation for partial disability under G.S. 97-30, since plaintiff had no right to claim compensation, nor was the employer exposed to liability, under G.S. 97-29 until 1978 when plaintiff appeared to have become totally disabled.

3. Master and Servant § 75—workers' compensation – total disability – medical expenses compensable

In a workers' compensation case there was no merit to defendant's argument that medical expenses should be compensated only to the extent they would tend to lessen the period of disability, since, if a plaintiff is found to be totally and permanently disabled, he will be entitled to medical expenses for life, dating from the time he became totally disabled, subject only to the requirements of G.S. 97-29 that the expenses be "reasonable and necessary."

APPEAL by plaintiff-employee from the North Carolina Industrial Commission. Opinion and award entered 3 April 1980. Heard in the Court of Appeals 3 February 1981.

On 8 June 1978 the plaintiff-employee (appellant) filed this claim for workers' compensation for occupational lung disease caused by exposure to cotton dust in his employment with the defendant-employer (appellee). After hearings in Albemarle and Concord, Deputy Commissioner Dianne C. Sellers found and concluded that plaintiff had contracted an occupational disease (byssinosis) as defined by G.S. 97-53(13) and rendered an Opinion and Award ordering payment of compensation for temporary partial disability for 300 weeks beginning 1 January 1970. In addition, the Deputy Commissioner ordered payment of \$8,500.00 for permanent, irreversible damage to both lungs and payment of all medical expenses as a result of the occupational disease. From this Opinion and Award, the defendant-employer gave Notice of Appeal to the Full Industrial Commission and filed an Application for Review. Subsequently, the

Smith v. American and Efird Mills

plaintiff-employee filed an Application for Review (plaintiff's counter-appeal).

In an Opinion and Award filed 3 April 1980, the Full Industrial Commission, by a two-to-one vote, (Commissioner Vance dissenting) struck the original award and rewrote it, therein reducing the sum of compensation previously ordered to temporary partial disability for 300 weeks only, beginning 1 January 1970. Furthermore, the Full Industrial Commission reduced the plaintiff-employee's award of medical expenses to those tending to lessen plaintiff's period of disability or to provide plaintiff needed relief from his occupational disease and incurred during the 300-week period beginning 1 January 1970. From the Opinion and Award of the Full Commission, the plaintiff-employee gave Notice of Limited Appeal to the North Carolina Court of Appeals pursuant to G.S. 97-86.1. The plaintiff's limited appeal was allowed by Order of the Chairman filed 27 May 1980, which noted that the defendant-employer did not give notice of appeal or file exception to the judgment of the Full Commission. Defendant moved to dismiss plaintiff's appeal for failure to file it within the thirty days allowed in G.S. 97-86. This Court allowed defendant's motion and dismissed the appeal; however, because plaintiff's appeal appeared to us to have substantial merit and because the appeal involved questions of first impression in this jurisdiction, we issued certiorari to the Commission in order to review the issues raised by the plaintiff. *See* Rule 21(a), N.C. Rules App. Proc.

The findings and conclusions of the Industrial Commission that plaintiff suffers from a compensable occupational disease are undisputed. Plaintiff does not contend that the Deputy Commissioner or the Full Commission incorrectly computed the rate and total sum of accrued partial disability compensation awarded pursuant to G.S. 97-30. Neither does appellant contest the Commission's conclusion that the applicable law for computing the partial disability award is G.S. 97-30, as it read on 1 January 1970, the date when plaintiff's period of partial disability began. Plaintiff challenges only the Full Industrial Commission's legal conclusions and amended award which limit plaintiff to partial disability compensation and medical expenses for 300 weeks only, denying him compensation for permanent and total disability under G.S. 97-29.

Smith v. American and Efird Mills

The evidence before the Deputy Commissioner, and later the Full Commission, was essentially undisputed. It included the testimony of plaintiff and his doctor, Douglas Kelling; the plaintiff's social security employment records, showing his earnings for the years 1937 to 1977; and the medical records and reports of Dr. Kelling after his first examination of plaintiff in 1978.

Plaintiff-employee, Spurgeon W. Smith, born on 7 May 1907, attended public school through the fourth grade and worked on a farm before starting his employment at defendant-employer's cotton textile mill in 1929. He worked more or less continuously until 1951, mostly in the card room at defendant's mill where he was exposed to cotton dust. Respiratory symptoms and breathing difficulty which began approximately 1935 caused plaintiff to miss work in the late 1940's. He stopped working at the mill in 1951, returning to farm work for about 10 years. He had no respiratory symptoms during that interval.

In 1962 plaintiff returned to defendant's mill and worked until September 1968. At that time his breathing difficulty became so severe he was forced to stop. From 1968 until the end of 1977, plaintiff worked and earned some wages at sedentary employment as a part-time night watchman. He earned no wages during the years 1974, 1975, and 1976. Since 1 January 1978 plaintiff's health has deteriorated and he is under the regular care of a pulmonary specialist. He regularly takes ten different types of medication and has a breathing machine and oxygen in his home.

Since September 1978 plaintiff has been under the care of Dr. Douglas G. Kelling, Jr., a specialist in pulmonary diseases, who has treated and hospitalized him. Dr. Kelling declared plaintiff totally and permanently unable to work as of 15 September 1978, on account of his occupational lung disease, and recommended that he receive regular medical care and treatment to sustain his life and give relief from his symptoms.

The plaintiff excepts to the following Conclusions of Law contained in the Opinion and Award of the Full Commission:

"2. Plaintiff is entitled to compensation as of 1 January 1970 when there was the first decrease in his average weekly wage, and thus when his disability, as defined by law, as a

Smith v. American and Eflrd Mills

result of byssinosis, first began. The plaintiff is, therefore, entitled to temporary partial disability compensation at the rate of \$31.55 per week for the 300-week period, using \$79.02 as the plaintiff's average weekly wage. Due to the exceptional circumstances of an unavailable wage chart, the procedure used to calculate the amount of \$79.02 is the fairest to the plaintiff and will most nearly approximate the amount plaintiff would have been earning had it not been for his contracting byssinosis. The total amount of compensation which can by law be paid to a claimant with the disability date of 1 January 1970 is \$18,000.00. G.S. 97-2(5) and (9); G.S. 97-29, as it read in 1970; G.S. 97-30; *Wood v. Stevens and Co.*, 297 N.C. 636 (1979).

3. For reasonable medical and/or treatment solely of such a nature as to tend to lessen plaintiff's period of disability or to provide plaintiff needed relief from his occupational disease and incurred during the 300-week period beginning 1 January 1970, employer is obligated to bear the cost thereof."

Plaintiff also excepts to the following conclusion, styled in the Opinion and Award as follows:

"COMMENT

This is a case of first impression before the Full Commission. In our opinion the date of disablement, 1 January 1970, brings to bear the statute as it existed on that date, with accompanying complications."

Plaintiff excepts to the following two Award provisions based on the foregoing conclusions:

"AWARD

1. As compensation for plaintiff's temporary partial disability defendants shall pay the plaintiff \$31.55 per week for a period of 300 weeks beginning 1 January 1970. This amount, having already accrued, shall be paid in a lump sum, less an attorney fee hereinafter awarded to plaintiff's counsel.

* * * *

Smith v. American and Eflrd Mills

3. For reasonable medical and/or treatment, solely of such a nature as to tend to lessen plaintiff's period of disability or to provide plaintiff needed relief from his occupational disease and incurred during the 300-week period beginning 1 January 1970, employer is directed to bear the cost thereof after bills for such have been approved by the Industrial Commission."

Hassell & Hudson by Charles R. Hassell, Jr. and R. James Lore for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe by J.A. Gardner, III for defendant appellee.

CLARK, Judge.

[1] This case presents us with the question of what compensation an employee may recover under the Worker's Compensation Act [the Act] for disability due to an occupational disease which at its inception was only partially debilitating, but which developed over time into a totally disabling condition. The employer argues that there is no evidence that the employee's condition progressed from partial disability to total. We disagree.

The Industrial Commission found as a fact that after being forced to leave the Mill, the employee had been able to work from 1968 to 1974 and again in 1977. These findings are supported by evidence before the Commission and unequivocally reflect that the employee's earning capacity, although diminished, continued until 1978. The employee does not appeal this finding of the Commission, nor does he question the conclusion that for the period of 1970 through 1977 he is entitled only to temporary partial disability compensation, nor does he question the award based thereon. Neither do we disturb the finding, conclusion, or award based upon partial disability beginning in 1970. We do note, however, that the employee brought this claim in 1978 at which time his testimony and the only medical testimony before the Commission agreed that he was totally and permanently disabled due to chronic obstructive lung disease, or byssinosis, caused by exposure to cotton dust. The record reveals that the employee did not work in 1978 or thereafter, and that he has not earned income since 1977.

Smith v. American and Efird Mills

Although the Opinion and Award of the Commission contains a finding that a physician had "determined plaintiff to be totally and permanently disabled" as of 15 September 1978, the Opinion contains no express finding of fact that the employee was or was not so disabled. We are fully aware that the jurisdiction of this Court is limited to the questions of law (1) whether there was competent evidence before the Commission to support its findings of fact and (2) whether such findings justify the legal conclusions and decision of the Commission. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950); *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977). This Court may, however, remand a case to the Commission for further findings of fact, where we determine that the findings are insufficient to permit a full and fair adjudication on all matters in controversy. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948).

"The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. . . . It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend."

Gaines v. Swain & Son, Inc., 33 N.C. App. at 579, 235 S.E. 2d at 859, quoting *Thomason v. Cab Co.*, 235 N.C. 602, 605-06, 70 S.E. 2d 706, 709 (1952).

All of the evidence tends to show that plaintiff became totally and permanently disabled in 1978 and the Commission found that "[o]n September 15, 1978, Dr. Douglas G. Kelling first examined the plaintiff and then diagnosed chronic obstructive lung disease, or byssinosis, on the basis of exposure to cotton dust, and as a result, determined plaintiff to be totally and permanently disabled." The Commission, however, did not find as a fact that plaintiff was totally and permanently disabled as all of the evidence tended to show. It is implicit that this failure

Smith v. American and Efird Mills

was based on the assumption that as a matter of law plaintiff would not be entitled to compensation for total and permanent disability. We think that the Commission erred in this assumption and that if plaintiff became totally and permanently disabled in 1978 that he would be entitled to compensation for total and permanent disability. We must, therefore, remand this case for a crucial finding of fact on the issue of whether, and if so when, plaintiff became totally and permanently disabled.

Since the Commission has already found as a fact that plaintiff was partially disabled from 1970, a finding that plaintiff became totally disabled in 1978 would allow no other conclusion than that the employee's condition became worse over that eight-year period, progressing from partial disability to total. Faced with such a state of facts, the Commission would be required to determine the extent of the compensation and medical expenses to which plaintiff would be entitled under the Act. We note that the question of a period of total and permanent disability following a period of partial disability appears to be one of first impression in this jurisdiction, and remand without ruling on the question would probably result in another appeal with consequent delay and cost.

Plaintiff argues that his worsened condition entitled him to additional compensation, under G.S. 97-47, beyond the 300 weeks for which he received compensation. We disagree. G.S. 97-47 provides as follows:

"Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded. . . ."

"The Commission's authority under this statute is *limited to review of prior awards*, and the statute is inapplicable in instances where there has been no previous final award." *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E. 2d 588, 592 (1971). See also *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27 (1960); *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E. 2d 777 (1953). In the instant case the only award of compensation is the one appealed from. The Commission, in this case, was not faced with any award to review since at the time of the hearing no award had yet been entered. The Industrial Commission could not err

Smith v. American and Efird Mills

then in failing to address the issue of changed condition under G.S. 97-47.

If the Commission should find on remand that plaintiff's disability had already become total at the time of the hearing, we believe the original award of the Commission would be rendered inadequate, because it was the responsibility of the Commission to award full compensation for the disability as it existed *at the time of the hearing*. As stated by our Supreme Court: "The Commission [in determining the compensation to be awarded] is concerned with conditions existing prior to and at the time of the hearing. If such conditions change in the future, to the detriment of the claimant, . . . [G.S. 97-47] affords the claimant a remedy. . . ." *Dail v. Kellex Corp.*, 233 N.C. 446, 449, 64 S.E. 2d 438, 440 (1951). The Commission apparently failed to make a finding on the issue of total disability because the Commission viewed the award under G.S. 97-30 as precluding a second award under G.S. 97-29. We cannot agree.

We realize that, at a given point in time, the provisions of G.S. 97-29 and G.S. 97-30 must be mutually exclusive; that is, a claimant cannot simultaneously be both totally and partially incapacitated. The Commission, however, is not limited to any given point in time, but is "concerned with conditions prior to and at the time of the hearing." *Id.* That the legislature envisioned that an employee might receive compensation under both G.S. 97-29 and G.S. 97-30 is apparent from the provision in G.S. 97-30 that: "In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability." We conclude from the above quotation (1) that the legislature considered the possibility that a claimant's condition might change before his claim was ever adjudicated; (2) that it intended that the claimant be compensated for each period during which his disability satisfied the language of one or the other of the statutes; and, (3) that the only limitation the legislature intended to place upon a claimant's compensation was that a claimant who was ultimately only partially disabled should be subject to the maximum established in G.S. 97-30 for the partially disabled. The failure of the legislature to make similar provision for adjusting the compensation allowable in the case of a period of partial disability followed by a total disability indicates to us an intention not to reduce the com-

Smith v. American and Efrid Mills

pensation available to a claimant whose condition deteriorates to one of permanent and total incapacity. Upon reading the statutes according to our understanding of their legislative intent, we conclude that should the Commission find that plaintiff was totally disabled in 1978 he would be entitled to compensation for total incapacity under G.S. 97-29 from the date in 1978 when it determines that he became totally incapacitated. "[T]he award of the Industrial Commission should, within statutory limits, compensate him for all disability suffered." *Giles v. Tri-State Erectors*, 287 N.C. 219, 225, 214 S.E. 2d 107, 111 (1975).

This view, that benefits may be laid end-to-end, is in accord with the great majority of jurisdictions according to Professor Arthur Larson's treatise on worker's compensation. 2 Larson, *The Law of Workmen's Compensation* § 59.42 (1980). Professor Larson cites a North Carolina case, *Baldwin v. Cotton Mills*, 253 N.C. 740, 117 S.E. 2d 718 (1961), to illustrate that an award for permanent total disability may follow a temporary total award without a reduction for the amount previously awarded and without regard to the statutory maximum number of weeks available under the earlier temporary total award. Moving on to the precise situation presented in the case *sub judice*, the Professor comments: "A familiar combination is permanent partial followed by permanent total. The usual holding is that the permanent partial award need not be deducted from the subsequent permanent total award." *Id.* at 10-347.

A case containing an excellent discussion of this issue is cited in the Larson treatise, *Durant v. Butler Brothers*, 275 Minn. 487, 148 N.W. 2d 152 (1967). In that case the Minnesota Supreme Court was faced with the following situation: An employee sustained an injury in 1953 which, although minor at the time, later contributed to the development of progressive arthritis in his knees. In 1959 he was awarded compensation for permanent partial disability of his legs. In 1962 the employee became totally disabled due to the increased arthritic condition in his knees. The Minnesota Industrial Commission awarded him compensation for permanent and total disability, "less the compensation previously paid for permanent partial disability arising out of the same accident." *Id.* at 489, 148 N.W. 2d at 154.

The Minnesota statute provided no formula for reducing an award for total disability, although the statute providing survi-

Smith v. American and Efirid Mills

vor's benefits made specific provision for reducing death benefits by an amount previously awarded. In reversing the Industrial Commission, the Minnesota Supreme Court, after examining the positions of the various jurisdictions, concluded that "The effect of the referee's decision to reduce the compensation payable for the permanent total disability by the full amount employee received for permanent partial disability is to say that he was not entitled to compensation for the period in which he was permanently partially disabled." *Id.* at 494, 148 N.W. 2d at 157. The Court went on to note that "there is no decisional or statutory authority for the credit applied by the commission against the compensation benefits awarded to employee for permanent total disability." *Id.*

We, too, find no authority for decreasing the award for total disability and therefore believe that plaintiff's compensation in the instant case should be to the fullest extent allowed under G.S. 97-29 and should be awarded without regard to the compensation previously awarded under G.S. 97-30. Our view that plaintiff should receive full compensation under G.S. 97-29 would apply only to the present fact situation, wherein the award under 97-30 had been fully paid *before* the plaintiff became totally disabled. Had the period for the partial disability award overlapped the period for the total award, a different result would be required because the stacking of total benefits on top of partial benefits, *for the same time period*, would allow plaintiff a greater recovery than the legislature intended. *See id.* Since, however, no such "stacking" of benefits occurred in this case, we see no reason to reduce the total disability award.

[2] Our conclusion that plaintiff is entitled to compensation under G.S. 97-29 gives rise to another issue: Should plaintiff be compensated for his permanent and total disability under G.S. 97-29 as it read in 1970 when plaintiff first became disabled, or as it read in 1978 when plaintiff's disability became permanent and total? The 1970 version of G.S. 97-29 provided for "a weekly compensation equal to sixty percent (60%) of his average weekly wages, but not more than fifty dollars (\$50.00), nor less than ten dollars per week during not more than four hundred weeks from the date of the injury, provided that the total amount of compensation paid shall not exceed eighteen thousand dollars." 1969 N.C. Sess. Laws Ch. 143 § 1. The 1978 version of G.S. 97-29 provides for an increased weekly compensation, and, more im-

Smith v. American and Efird Mills

portantly, that compensation for permanent total disability "shall be paid for by the employer during the lifetime of the injured employee." 1973 N.C. Sess. Laws Ch. 1308, §§ 1, 2.

We are well aware that the law of this jurisdiction is that the applicable version of the statute is the one in effect when the disability occurs. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). As applied to the present facts, however, this simple rule can become difficult to apply unless one bears in mind the rationale for the rule as stated in the case: The date of disability is the date upon which the employee's claim accrues and the date upon which the employer becomes liable. *Id.* at 644, 650, 256 S.E. 2d at 697, 701. We read *Wood* to require that a given statute within the Act be applied as it read at the time plaintiff first gained rights and defendant first became liable under that statute. We do not understand the *Wood* holding to require that the entire Workers' Compensation Act be applied as it existed at the time plaintiff's right to proceed under any provision of the Act first accrued. We believe plaintiff could become disabled, for the purpose of determining the applicable version of a statute, at different times under different statutes.

In 1970, plaintiff became partially disabled under G.S. 97-30 and thus became entitled to recover for partial disability under the 1970 version of that statute. Plaintiff had no right to claim compensation, nor was the employer exposed to liability, under G.S. 97-29 until 1978 when plaintiff appears to have become totally disabled; therefore, plaintiff became disabled, for purposes of G.S. 97-29, on the date in 1978 when his disability became total, and the version of G.S. 97-29 then in effect should be applied in determining the compensation to be awarded thereunder.

Under the 1978 version of G.S. 97-29 the award for total and permanent incapacity is to include "reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services . . . during the lifetime of the injured employee." The Commission would be required by this statute to award plaintiff medical expenses if they find plaintiff to be totally and permanently disabled. No finding that the medical treatment is necessary will be required since the Commission's finding of fact number 6 recited in part:

Smith v. American and Efird Mills

“Dr. Kelling believes, and it is hereby so found, that medical treatment will be necessary for plaintiff’s lifetime and will provide the plaintiff with needed relief, though treatment will not reverse the damage to the lungs which has become permanent, but will only serve to prevent further damage.”

The issue of whether the expenses are reasonable must, of course, be decided piecemeal as each bill is individually submitted to the Commission for its approval.

[3] Defendant’s argument that medical expenses should be compensated only to the extent they would lessen the period of disability strikes us as untenable. Plaintiff’s recovery of medical expenses might be so limited if he were proceeding under the provisions of G.S. 97-25 or G.S. 97-59, but G.S. 97-29 makes separate provision for medical expenses in cases of total and permanent disability. It appears obvious to us that the legislature, recognizing that employees who were truly totally and permanently disabled had no hope of recovery or of a lessened period of disability, intended to further the humanitarian goals of the Act by providing that in the case of the totally and permanently disabled, necessary medical treatment would be afforded under the Act even though it would do nothing to lessen the disability. If plaintiff is found to be totally and permanently disabled he will be entitled to medical expenses for life, dating from the time he became totally disabled. His entitlement will not be subject to limitations found in G.S. 97-25 or -59 or decisions based thereon, but will be subject only to the requirements of G.S. 97-29 that they be “reasonable and necessary.”

Based on the foregoing decision, this case is remanded to the Industrial Commission for a determination of the crucial factual issue of whether plaintiff became permanently and totally disabled in 1978 and for an award under G.S. 97-29 as outlined in this opinion for such permanent total disability if the Commission finds as a fact upon rehearing that plaintiff became totally and permanently disabled in 1978 as all of the evidence before us on this appeal tends to show.

Remanded.

Judges MARTIN (Robert M.) and ARNOLD concur.

State v. Harper

STATE OF NORTH CAROLINA v. CURTIS HARPER

No. 803SC1065

(Filed 21 April 1981)

1. Criminal Law § 73.2— testimony not within hearsay rule

In a prosecution for felonious possession of stereo speakers stolen from a church, a witness's testimony about a conversation he had with a person at the church concerning the stolen speakers was not inadmissible hearsay since it was not offered to prove the truth of the matters asserted therein but was offered to show why the witness later got in touch with the person at the church after defendant had offered to sell the speakers to him.

2. Criminal Law § 77.2— testimony not excludable as self-serving declaration

In a prosecution for felonious possession of stereo speakers stolen from a church, a witness's testimony that he was attempting to obtain the stolen speakers in order to return them to the church and that he did not intend to keep them was not excludable as a self-serving declaration.

3. Larceny § 6.1; Receiving Stolen Goods § 4— value of stereo speakers — opinion testimony

In a prosecution for felonious possession of stereo speakers stolen from a church, the trial court did not err in permitting a trustee of the church to state his opinion that the two speakers had a value of about \$200 each where the trustee was familiar with the purchase of the church's sound system and testified that the speakers were a part of the sound system which had an installation cost of \$1,200, and where the speakers were present in the courtroom so that the jurors could see them and decide for themselves whether the trustee's evaluation of the speakers was reasonable.

4. Receiving Stolen Goods § 5.1— felonious possession of stolen property – sufficiency of evidence

The evidence was sufficient for the jury in a prosecution for felonious possession of stereo speakers stolen from a church where the jury could have found that the speakers had a value of more than \$400 from testimony by a church trustee that the speakers were valued at "about \$400," and where the jury also could have found that defendant knew or had reason to know that the goods had been stolen pursuant to a breaking and entering from the trustee's testimony about discovery of the theft, an officer's testimony that a report of the theft had been made by church officials on 28 March, and defendant's testimony that he fled when a policeman stopped him with the speakers in his possession on 3 April because he suspected that the speakers might have been stolen.

5. Criminal Law § 117.4— charge to scrutinize accomplice testimony – absence of request

In the absence of a special request, the trial court need not charge the jury to scrutinize carefully the testimony of an accomplice.

State v. Harper

6. Criminal Law § 112.4— instructions on circumstantial evidence – absence of request

In the absence of a special request, the trial court need not charge the jury on establishing guilt by circumstantial evidence.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 3 September 1980, CRAVEN County Superior Court. Heard in the Court of Appeals on 10 March 1981.

Defendant, Curtis Harper, was indicted and convicted of felonious possession of stolen goods — two loudspeakers having the value of \$400 and being the personal property of the First Baptist Church of New Bern. From a verdict and active prison sentence, defendant appeals.

At trial, Bernie Woodfork testified for the State that in April 1980, defendant asked him if he were interested in buying some speakers which defendant stated he owned, and Woodfork told defendant he “was interested in them.” Woodfork, however, knew that the First Baptist Church was missing a set of speakers, so Woodfork left defendant long enough to go to the church to see a picture of the speakers. When Woodfork returned, defendant took him to an apartment house in which defendant’s sister lived, removed the hinges from a closet door, and showed Woodfork the two speakers. Woodfork again told defendant that he was interested in buying the set of speakers, which he recognized as looking exactly like the speakers shown in the picture at the church.

Woodfork and defendant took the speakers in Woodfork’s car to a friend’s house to see if they worked, and when they were unable to test them on the friend’s equipment, they left. As Woodfork and the defendant were loading the speakers back into Woodfork’s car, a New Bern Police Officer drove up in an unmarked car. Defendant dropped the speaker he was carrying and ran. The policeman confiscated the speakers and told Woodfork that his car could be impounded if the speakers were stolen. Woodfork then located the defendant and told him that they had to go to the police station and straighten out the matter. Defendant told Woodfork to tell the police that he had bought the speakers from a Marine.

Bradley Cheatham, a trustee of the First Baptist Church of New Bern, identified the speakers that police took from Woodfork as those missing from the church. He testified that the

State v. Harper

speakers were part of a system which cost the church \$1,200 and estimated their value at \$200 each. A New Bern Police Officer testified that the model and patent number of the speakers taken from Woodfork were identical to the numbers of the speakers taken from the church.

Defendant testified that on 3 April 1980 he was with Woodfork at a New Bern apartment house when a male, who appeared to be a Marine, approached them offering to sell stereo speakers to Woodfork. Woodfork and the Marine pried open a padlocked closet and inside were three speakers, one black and two brown ones. Woodfork paid the Marine some money for the two brown speakers, and Woodfork and the defendant took the speakers to a friend's house to try them out. When the friend's stereo system would not fit the speakers, they carried them back to Woodfork's car. At that time, a police car drove up. Defendant then realized that the speakers might be stolen and because he did not want to get in trouble, he walked away. He agreed to go with Woodfork to the police station to straighten out the matter because he knew nothing about the speakers.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Bowers & Sledge, by E. Lamar Sledge and Robert G. Bowers, for the defendant appellant.

BECTON, Judge.

[1] Defendant first contends that the court erred in permitting Woodfork to testify about a conversation he had with Carolyn Hickman at the First Baptist Church concerning the stolen stereo speakers. The basis for the hearsay assignment of error is as follows:

Q. Now, Mr. Woodfork, prior to the third of April, had someone talked to you about some speakers?

MR. SLEDGE: Objection.

THE WITNESS: There was a lady at the First Baptist Church that said she was missing some speakers.

MR. SLEDGE: Objection.

MR. BESWICK: Your Honor, may we approach the bench?

State v. Harper

THE COURT: Yes.

(A bench conference was held without the hearing of the court reporter or the jury.)

THE COURT: Sustained.

BY MR. BESWICK: Mr. Woodfork, you say prior to the third of April you had a conversation with some lady; is that right?

A. Yes, sir.

Q. What was her name?

A. Carolyn Hickman.

MR. SLEDGE: Objection.

THE COURT: Overruled.

BY MR. BESWICK: Carolyn what?

A. Hickman.

I told Harper I was interested in them. Then I told him I would be back in a few minutes. I left and went to the First Baptist Church. I asked Carolyn Hickman if she had a picture of the speakers. She said yes, and showed me the picture. Then she called Capt. McConnell (of the New Bern Police Department).

“It is universally accepted that the testimony by a witness of what another person said is inadmissible hearsay if it is offered into evidence to prove the truth of the matter being asserted.” *State v. Grier*, 51 N.C. App. 209, 213, 275 S.E. 2d 560, 563 (1981). *See also* 1 Stansbury N.C. Evidence, § 138 (2d ed. Brandis Rev. 1973). However, a statement offered for any other purpose than to prove the truth of the matter asserted therein is not inadmissible as hearsay. 1 Stansbury, *supra*, at §§ 138 and 141. The testimony concerning what Carolyn Hickman told Woodfork was offered to explain Woodfork’s subsequent conduct. Hence, it was not subject to objection as hearsay. *See, e.g., State v. Shadding*, 17 N.C. App. 279, 194 S.E. 2d 55, *cert. denied*, 283 N.C. 108, 194 S.E. 2d 636 (1973); *State v. Miller*, 15 N.C. App. 610, 190 S.E. 2d 722, *cert. denied*, 282 N.C. 154, 191 S.E. 2d 603 (1972), *cert. denied*, 410 U.S. 990 (1973). The testimony merely

State v. Harper

showed why Woodfork later got in touch with Carolyn Hickman after defendant had approached him concerning whether he might be interested in buying the speakers.

Moreover, with respect to the first and second "objections" noted above, no motions to strike were made and no cautionary instructions were sought. Since the trial court sustained the objections to the testimony, the defendant has no further grounds to complain. *State v. Dickens*, 11 N.C. App. 392, 181 S.E. 2d 257 (1971).

[2] Woodfork testified that he was attempting to obtain the stolen speakers in order to return them to the church and that he did not intend to keep them. The defendant contends that this testimony should have been excluded as a self-serving declaration. We disagree. Indeed, the thrust of the entire testimony of Woodfork was that he was helping the church to recover the stolen property — he knew that the church's speakers had been stolen before he met defendant on 3 April 1980. After defendant showed him the speakers, Woodfork went to the church and talked to Carolyn Hickman and was shown photographs of the speakers; he was aware that Ms. Hickman had called the police with regard to his inquiry; and he recognized the speakers defendant showed him as being similar to the ones that were stolen from the church. Even if Woodfork's statement could be termed "self-serving," "[n]ot every erroneous ruling on the admissibility of evidence, however, will result in a new trial." *Board of Education v. Lamm*, 276 N.C. 487, 492, 173 S.E. 2d 281, 285 (1971).

It is also important to note here that the phrase "self-serving declaration" does not describe an independent ground of objection in North Carolina. "Hearsay statements are sometimes excluded on the ground that they are 'self-serving'." 1 *Stansbury, supra*, §140 at 466. However, if a statement is hearsay and does not fall within one of the hearsay exceptions, it is excluded, whether self-serving or not. If a statement fits an exception, then it is admissible even if self-serving, unless the particular exception prohibits it. (For example, declaration against interest.) See *Trust Co. v. Wilder*, 255 N.C. 114, 120 S.E. 2d 404 (1961); 1 *Stansbury, supra*, §140.

[3] Defendant also contends he is entitled to a new trial because the "[w]itness Cheatham . . . was allowed to testify that

State v. Harper

he had priced speakers of similar size or type, and that in his opinion the two speakers were of a value of about \$200 each." Although an exception is set out in the record, defendant at no point objected to, or moved to strike, the testimony of the witness Cheatham. The competency of this testimony is therefore not properly before this court. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *State v. Moore*, 27 N.C. App. 284, 218 S.E. 2d 499 (1975). Moreover, the testimony establishing the value of the speakers at \$200 each was elicited by the defendant himself on cross examination. He cannot, then take exception to this testimony. *State v. Fletcher*, 279 N.C. 85, 96, 181 S.E. 2d 405, 413 (1971). In further support of the decision we reach, the record reveals that Mr. Cheatham was a trustee of the church and was apparently familiar with the purchase of the sound system — he testified that the speakers were a part of the sound system at the church having an installation cost of \$1,200. Additionally, the speakers were present in the courtroom where the jury could see them and decide for themselves whether Cheatham's evaluation of the speakers was reasonable. When all of these factors are considered, admission of the testimony, even over objection, would not have been error. *Veach v. American Corp.*, 266 N.C. 542, 146 S.E. 2d 793 (1966); *Hopkins v. Comer*, 240 N.C. 143, 81 S.E. 2d 368 (1954).

[4] Defendant further contends that the court erred in denying his motion, made at the close of the State's case, to dismiss for insufficiency of the evidence. In support of his contention, he argues that there was no direct evidence of theft by breaking and entering and that the only evidence of a felony theft was the "opinion of a non-expert witness [Bradley Cheatham] ... [which was not] competent evidence of value. ..."

We note first that defendant's motion was not renewed at the close of all the evidence. Since defendant chose to put on evidence, error in the denial of the motion at the close of the State's evidence is deemed waived. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972). Nonetheless, "the sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial. ..." G.S. 15A-1227(d) and G.S. 15A-1446(d)(5); *State v. Alston*, 44 N.C. App. 72, 73, 259 S.E. 2d 767, 768 (1979).

State v. Harper

Defendant was charged with feloniously possessing stolen property in violation of G.S. 14-71.1. The indictment could have supported proof either that defendant knew or had reason to know that the property was feloniously stolen pursuant to a breaking and entering, or otherwise by means described in G.S. 14-72(b),¹ or that the property stolen was of a value in excess of \$400. The evidence presented at the trial would have supported a verdict under either theory. Since we find no error in Bradley Cheatham's testimony establishing that the speakers were valued "about" \$400, there was evidence to support the conclusion that the goods were of a value of more than \$400. The jury was free to consider Cheatham's estimation in light of their own appraisal from viewing the speakers in the courtroom. "An estimate has been held to be some evidence of value." *State v. Cotton*, 2 N.C. App. 305, 311, 163 S.E. 2d 100, 104 (1968).

Mr. Cheatham also testified about the discovery of the theft. Officer Dunn of the New Bern Police Department testified, without objection, that a report of the larceny had been made by church officials on 28 March 1980. Moreover, the defendant himself admitted on direct examination that he fled because he suspected that the speakers might have been stolen. This evidence taken together is sufficient to support a finding by the jury that the defendant knew or had reason to know that the goods had been stolen pursuant to a breaking and entering.

[5] Defendant asserts that the trial court committed prejudicial error in failing to instruct the jury, *sua sponte*, that it should carefully scrutinize the testimony of the alleged accomplice, Woodfork. Instructions on the testimony of an accomplice

¹ G.S. 14-72(b): The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

- (1) From the person; or
- (2) Committed pursuant to a violation of G.S. 14-51 [First and second degree burglary], 14-53 [Breaking out of dwelling house burglary], 14-54 [Breaking or entering buildings], or 14-57 [Burglary with explosives];
or
- (3) Of any explosive or incendiary device or substance. . . .
- (4) Of any firearm. . . .
- (5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8).

Seaman v. McQueen

are a subordinate feature of a case. In the absence of a special request, the court need not charge the jury to carefully scrutinize the testimony of an accomplice. *State v. Guffey*, 265 N.C. 331, 144 S.E. 2d 14 (1965); *State v. Grant*, 40 N.C. App. 58, 252 S.E. 2d 98 (1979). The record on appeal contains no such request by the defendant. Therefore, this assignment of error is meritless. *State v. Roux*, 266 N.C. 555, 563, 146 S.E. 2d 654, 660 (1966); *State v. Sealey*, 41 N.C. App. 175, 177, 254 S.E. 2d 238, 240 (1979).

[6] Defendant finally asserts that he is entitled to a new trial because the court failed to instruct, *sua sponte*, on establishing guilt by circumstantial evidence. Again, in the absence of a request for an instruction on this matter, the court is not required to so instruct the jury. *State v. Hood*, 294 N.C. 30, 44, 239 S.E. 2d 802, 810 (1978).

In this trial, we find

No error.

Judge VAUGHN and Judge WELLS concur.

RHINEHEARDT P. SEAMAN, PLAINTIFF v. BERNIE GARRETT
McQUEEN, JR., DEFENDANT v. JULIA GRADY McQUEEN, THIRD-PARTY
PLAINTIFF

No. 8010SC720

(Filed 21 April 1981)

1. Automobiles § 79– intersection accident – contributory negligence as jury question

In an action to recover for injuries sustained by plaintiff in an automobile accident the issue of plaintiff's contributory negligence was properly submitted to the jury, and the trial court erred in granting judgment n.o.v. on the ground that the evidence established plaintiff's contributory negligence as a matter of law where the evidence tended to show that plaintiff entered the intersection on a green light; defendant entered the intersection on a red light as he followed a school bus; plaintiff saw the school bus both as it entered the intersection and as it straightened out after it completed its turn; a jury could therefore determine that plaintiff was sufficiently aware of what was going on to his left to satisfy his duty to maintain a proper lookout; even if plaintiff had looked to his left, his view of defendant's car would have been obscured by the bus; a jury question existed as to whether

Seaman v. McQueen

notice to plaintiff of defendant's failure to stop for a red light, occurring so late in the chain of events which led up to the collision, was sufficient to allow him in the exercise of due care to avoid the collision; and a jury could infer that plaintiff would have been unable to avoid the collision in the short space of time between the emergence of defendant's vehicle from behind the school bus and the collision of the two vehicles.

2. Trial § 42.2— quotient verdict – granting of new trial error

In an action to recover damages arising out of an automobile accident, the trial court's granting of a new trial on the issue of damages on the ground that the jury returned a quotient verdict was erroneous, since the trial court's action was based on the bailiff's finding in the jury room, after the verdict was rendered, small pieces of paper with figures and a piece of paper containing twelve figures added and divided by twelve with the result the same as the verdict rendered by the jury, but no evidence appeared of record to support a finding that the jurors agreed beforehand to be bound by a quotient, or that they failed to adopt the quotient as their verdict.

APPEAL by plaintiff from *Braswell, Judge*. Judgment entered 25 April 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 11 February 1981.

Plaintiff alleges he was injured by defendant's negligent operation of a motor vehicle. Defendant alleges contributory negligence. Defendant's father entered the case as a third-party plaintiff alleging property damage to the vehicle defendant was driving due to plaintiff's negligent operation of his own motor vehicle. Upon the death of defendant's father, defendant's mother was substituted as third-party plaintiff pursuant to the consent of all parties.

In a pretrial order the parties stipulated, in pertinent part, (1) that on 22 October 1976 at approximately 3:30 P.M. plaintiff was operating his truck in a southerly direction along U.S. Highway 1A at its intersection with Millbrook Road (R.P.R. 2108), and defendant was operating an automobile in a westerly direction on Millbrook Road; and (2) that traffic control lights at the intersection of U.S. Highway 1A and Millbrook Road were operating properly.

At trial before a jury plaintiff's evidence tended to show the following: The weather was fair. Plaintiff noticed that the stop light was red when he was still 200 feet from the intersection. He looked to his left and right. To his left he noticed a school bus about to enter the intersection to turn into U.S. One North. Plaintiff slowed down to approximately 20 m.p.h. Plaintiff testi-

Seaman v. McQueen

fied that the school bus had "come out a little bit into the intersection before turning right." Plaintiff testified that when the light turned green, "[t]he bus had already made its turn and straightened out." On cross-examination plaintiff was asked if he looked to his left after the light changed. He answered, "No," although he also testified, "I saw the school bus had done made its turn when I proceeded across [the intersection]." Plaintiff entered the intersection and was struck by defendant's car from the left. Defendant had been proceeding west on Millbrook Road. Plaintiff first observed defendant's automobile at a distance of approximately ten feet. Plaintiff was injured in the collision.

Defendant's evidence tends to show the following: Defendant was proceeding west on Millbrook Road. There were two westbound lanes. Defendant was in the one to the left. There was a school bus in the right lane just ahead of defendant. Defendant was going about 35 m.p.h. as he approached the intersection. The light was green. Defendant's view to his right was obscured by the school bus. He did not see plaintiff's automobile until he was about 20 feet away. A passenger in the car testified that the light had turned yellow as the bus entered the intersection and that defendant's car had been a car length or two behind the bus. The passenger had not seen the plaintiff's car until they passed the bus. The school bus driver testified that the light had turned yellow as he entered the intersection and that defendant's car had been even with the back of the bus or behind it.

Defendant moved for directed verdict both at the close of plaintiff's evidence and at the close of all the evidence. Both motions were denied. The jury determined that the defendant had been negligent, that plaintiff had not been contributorily negligent, and that plaintiff had been damaged in the amount of \$3,400.00.

After the trial the bailiff went into the jury room to retrieve the legal pad which the jury had been furnished for its deliberations and discovered small pieces of paper with figures and a piece of paper containing twelve figures added and divided by twelve. The result was \$3,408.33. The attorneys had already left the courtroom for the day. The judge called them in the next morning and informed them of the situation. He then granted

Seaman v. McQueen

defendant's motion for a judgment notwithstanding the verdict, and in the alternative he set aside the verdict as against the weight of the evidence. He also granted a new trial on the issue of damages based on his findings that the jury had returned a quotient verdict.

Young, Moore, Henderson & Alvis by Dan J. McLamb for plaintiff appellant.

Ragsdale and Liggett by Peter M. Foley for defendant appellee.

CLARK, Judge.

[1] The record indicates that the trial court granted judgment notwithstanding the verdict on the ground that the evidence established plaintiff's contributory negligence as a matter of law. "[I]n passing on a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the non-movant." *Summey v. Cauthen*, 283 N.C. 640, 648, 197 S.E. 2d 549, 554 (1973). Judgment as a matter of law then on the ground of contributory negligence should be granted only when plaintiff's contributory negligence is so clearly established that no other reasonable inference or conclusion may be drawn. *Currin v. Williams*, 248 N.C. 32, 102 S.E. 2d 455 (1958).

Plaintiff's testimony that he entered the intersection on a green light must be taken as true on this motion for judgment notwithstanding the verdict. His duty upon entering the intersection has been defined as follows:

"[A] motorist facing a green light as he approaches and enters an intersection is under the continuing obligation to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner as not to endanger or be likely to endanger others upon the highway. [Citation omitted] Nevertheless, in the absence of anything which gives or should give him notice to the contrary, a motorist has the right to assume and to act on the assumption that another motorist will observe the rules of the road and stop in obedience to a traffic signal.' [Citations omitted.]

'It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel; and

Seaman v. McQueen

he is held to the duty of seeing what he ought to have seen.' [Citations omitted.]

'While ordinarily a driver may proceed on a green or "go" light or signal, he may not rely blindly thereon but should exercise due care as to others who may be in the intersection.' [Citation omitted.] Even so, a green light is a signal for a motorist to proceed; and if, when he starts forward in response to the green light, no other vehicle is then within the intersection or approaching the intersection within the range of his vision under circumstances sufficient to put him on notice that it is not going to stop in obedience to the red light, his primary obligation thereafter is to keep a proper lookout in the direction of his travel. In such case, he has a right to assume that any motorist approaching from his left on the intersecting street will stop in obedience to the red light facing him unless and until something occurs that is reasonably calculated to put him on notice that such motorist will unlawfully enter the intersection."

Jones v. Schaffer, 252 N.C. 368, 375, 114 S.E. 2d 105, 110-11 (1960).

From the foregoing we conclude that the only direction plaintiff was specifically required to look was "in the direction of travel"; that he was required to look to his left only as necessary to "maintain a proper lookout"; and that he was "chargeable with notice only of what he could and should have seen had he looked to his left." *Id.* at 375-76, 114 S.E. 2d at 111. From plaintiff's evidence that he saw the school bus both as it entered the intersection and as it straightened out after it completed its turn, a jury could infer that whether or not plaintiff actually looked to his left, he was sufficiently aware of what was going on to his left to satisfy his duty to maintain a proper lookout. The law is clear that the mere failure to look to his left was insufficient evidence standing alone to support a holding of contributory negligence as a matter of law. *Currin v. Williams*, 248 N.C. at 36, 102 S.E. 2d at 458; *Ford v. Smith*, 6 N.C. App. 539, 170 S.E. 2d 548 (1969). Further, both plaintiff's and defendant's evidence support an inference by the jury that even if plaintiff had looked to his left his view of defendant's car would have been obscured by the school bus. Defendant's own testimony was that he did not see the plaintiff's car, because the school

Seaman v. McQueen

bus blocked his view, until he was about 20 feet from the collision. We believe a reasonable juror could infer from this testimony that the school bus blocked the plaintiff's view of the defendant as effectively as it blocked defendant's view of the plaintiff. It is clearly a jury question whether notice to plaintiff of defendant's failure to stop for a red light, occurring so late in the chain of events which led up to the collision, was sufficient to allow him in the exercise of due care to avoid the collision. Defendant's own evidence was that he was unable to avoid the collision upon seeing the plaintiff emerge from behind the school bus. A jury could infer that the plaintiff, too, would have been unable to avoid the collision in the short space of time between the emergence of defendant's vehicle from behind the school bus and the collision of the two vehicles. We hold that the issue of plaintiff's contributory negligence was properly submitted to the jury, and it should not have been disturbed. Judgment notwithstanding the verdict for the defendant is vacated.

The foregoing discussion in support of our reversal of the trial court's entry of judgment notwithstanding the verdict applies equally to that court's granting a new trial on the grounds that the jury's verdict was "against the greater weight of the evidence." Defendant argues that this ruling was a matter entrusted to the sound discretion of the trial judge and should not be disturbed, absent abuse. Our Supreme Court has noted, "The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, *if no question of law or legal inference is involved* in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion." *Selph v. Selph*, 267 N.C. 635, 637, 148 S.E. 2d 574, 575-76 (1966) (emphasis added). This discretionary power extends to the granting of a new trial as against the greater weight of the evidence under Rule 59(a)(9). See *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). As noted above, however, the appellate courts are limited to the abuse of discretion standard only where the motion involves "no question of law or legal inference." *Selph v. Selph*, *supra*. Our examination of the record leads us to the firm conclusion that the trial court's granting a new trial on the issue of contributory negligence was based upon the erroneous legal inference that failure by the plaintiff to look to his left as he entered the intersection constituted contributory negligence

Seaman v. McQueen

as a matter of law. Believing the greater weight of the evidence to establish that plaintiff failed to take a last look to his left, the court ruled that a verdict for plaintiff on the contributory negligence issue was against the greater weight of the evidence. The trial court's legal error was its assumption that the question of plaintiff's contributory negligence turned solely upon the question of whether he looked to his left immediately before entering the intersection. As we have explained, this is not the law. Our reversal of the trial court's grant of a new trial on the issue of contributory negligence is based therefore, not upon abuse of discretion, but upon the same error of law that rendered the judgment notwithstanding the verdict erroneous.

[2] The trial court's granting of a new trial on the issue of damages on the ground that the jury returned a quotient verdict was also legal error. It is the well-established law of North Carolina that no quotient verdict exists unless the jurors reach a *prior agreement* to be bound by the average of the amount each submits as damages. *Collins v. Highway Com.*, 240 N.C. 627, 83 S.E. 2d 552 (1954) (per curiam); *Highway Comm. v. Cemetery, Inc.*, 15 N.C. App. 727, 190 S.E. 2d 641 (1972); *Highway Commission v. Matthis*, 2 N.C. App. 233, 163 S.E. 2d 35 (1968). See also, 12 Strong's N.C. Index 3d, *Trial* § 42.2 (1978). No evidence appears of record to support a finding that the jurors agreed beforehand to be bound by a quotient, or that they failed to adopt the quotient as their verdict; therefore, the trial court's order awarding the defendant a new trial on the ground that the jury returned a quotient verdict reflects an error of law and must be vacated.

Defendant argues strenuously that the trial court's granting of a new trial as to the damages issue under Rule 59 should be committed to the sound discretion of the trial court and not disturbed absent manifest abuse of discretion. We conclude, however, that this too involves a "question of law or legal inference" and is therefore subject to reversal for legal error.

The judgment of the trial court is therefore vacated and the case remanded for entry of judgment in accordance with the verdict.

Vacated and remanded.

Judges ARNOLD and MARTIN (Harry C.) concur.

State v. Howell

STATE OF NORTH CAROLINA v. BARBARA SULLENS HOWELL

No. 8027SC952

(Filed 21 April 1981)

Criminal Law § 142.3; Searches and Seizures § 13—probation condition—consent to searches by probation officer—participation of law officers in search

Where a valid condition of defendant's probation required her to submit at reasonable times to warrantless searches by a probation officer of her person, vehicle and premises as authorized by G.S. 15A-1343(b)(15), a probation officer's search of defendant's home was not unlawful because the officer was accompanied by four police officers who also participated in the search, and evidence discovered during the search was admissible in defendant's probation revocation hearing.

Judge CLARK dissenting.

APPEAL by defendant from *Lewis, Judge*. Order signed 12 June 1980 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 11 February 1981.

Upon defendant's plea of guilty to forgery of a prescription for a controlled substance, she was given a suspended sentence and placed on probation for five years. Conditions of defendant's probation included, along with other terms, that she: "(1) Submit at reasonable times to warrantless searches by a probation officer of his person, and of his vehicle and premises while he is present, for purposes reasonably related to his probation supervision" and "(m)(4) That she not have on or about her possession any form of prescription or written prescription whatsoever for any Controlled Substance."

The State's evidence, through the testimony of Joyce D. Lee, defendant's probation officer, established that defendant's residence was searched by the probation officer and four law enforcement officers. The probation officer testified that a week before the search an informant advised her that defendant was using drugs. The day of the search, Sergeant Boyes of the Shelby Police Department, notified Joyce Lee that according to a reliable informant defendant had prescriptions, drugs and stolen merchandise in her possession.

As a result of the search several prescription forms were found in the basement of defendant's house, and several items

State v. Howell

of stolen merchandise were found in the back yard. No search warrants were obtained by the police officers.

Defendant appeals from the denial of her motion to suppress the items found in the warrantless search and the subsequent revocation of her probation.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

O. Max Gardner III for defendant appellant.

ARNOLD, Judge.

Assignments of error by defendant on this appeal question the legality of the warrantless search of her residence. She concedes the validity of the condition of her probation that she submit to reasonable searches by her probation officer. However, she contends that G.S. 15A-1343(b)(15) only authorizes a warrantless search of a probationer's home by a probation officer, and that police officers may not participate, either directly or indirectly, in the warrantless search. The probation officer, according to defendant's view of G.S. 15A-1343(b)(15), could not request assistance of police officers to conduct the search.

G.S. 15A-1343(b)(15) provides that as a condition of probation the court may require the probationer to:

(15) Submit at reasonable times to warrantless searches by a probation officer of his person, and of his vehicle and premises while he is present, for purposes reasonably related to his probation supervision. The Court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful.

Arguing that the evidence obtained in the search should have been excluded, defendant cites this Court's opinion in *State v. Grant*, 40 N.C. App. 58, 252 S.E. 2d 98 (1979), for the proposition that law enforcement officials may not accompany a probation officer in a warrantless search of a probationer's home. In *Grant*, no search was ever made, but the probation condition that defendant submit to a warrantless search at the request of any law enforcement officer was struck down as violative of G.S. 15A-1343. The situation in *Grant*, however, is unlike the case now before us. The probation condition in the case *sub judice* provided that defendant submit to searches by

State v. Howell

her probation officer. We do not agree with defendant that the presence of the police officers brings the case within the purview of *Grant*.

Defendant admits that Joyce Lee and the officers arrived at her home together, and that Lee was present throughout the search of the residence. Joyce Lee testified that she enlisted the aid of the law enforcement officers, and that she actively participated in the search of the basement. The probation officer testified that after defendant failed to respond to her knocking at the door, she and the officers went around to the back of the house seeking entrance, and there discovered in plain view stolen merchandise still in the packing crates. When defendant finally opened the door, she was arrested, and the probation officer, along with the law enforcement officers, searched the house.

We find no merit in defendant's contention that Joyce Lee's actions in bringing the four law enforcement officers to help with the search was unreasonable. Joyce Lee stated that she knew defendant was living with a man, and that she would not have gone to the house without police assistance. As the State points out, it would have been difficult for Ms. Lee to conduct a useful search of the house described in the record, and keep watch of two individuals at the same time. A probation officer's search as authorized by G.S. 15A-1343(b)(15) is not necessarily invalid due to the presence, or even participation of, police officers in the search.

Moreover, we are not persuaded by defendant's argument that the warrantless search was initiated and accomplished by the police and was therefore unreasonable. Through the testimony of Joyce Lee the evidence is sufficient to support the trial court's finding that "under the circumstances disclosed by this evidence" the search was reasonable.

The order of the trial court revoking defendant's probation is

Affirmed.

Judge MARTIN (Harry C.) concurs.

Judge CLARK dissents.

CLARK, Judge, dissenting:

State v. Howell

The testimony of Probation Officer Joyce D. Lee, the only witness to testify at the revocation hearing, reveals the following:

1. Probation Officer Joyce D. Lee was informed the week before the 31 March 1980 raid and search that defendant was using drugs. The officer did not then visit or attempt to search defendant's home.

2. The Violation Report included charges that defendant had violated conditions of the probation judgment in that she had refused to work, and had refused to pay the court costs and fine, in addition to the charge of possessing prescriptions for controlled substances. Testimony was offered tending to show violations of all three conditions. The refusal to work and refusal to make payment violations had existed for some time, but were not reported until after the 31 March 1980 raid. It is noted that the revocation judgment appealed from included no finding of fact relative to violation of the work and payment provisions.

3. On the morning of 31 March 1980 the Probation Officer was advised by a telephone call from Officer Boyes that defendant, who lived with her boyfriend, possessed drug prescriptions and stolen property, according to information furnished by a reliable informant. No effort was made to get a search warrant.

4. Sgt. Boyes and three other law officers came by Probation Officer Lee's office; and they, in two cars, went to defendant's home. A fifth officer, Sgt. Roadcap, accompanied them in a third car for the purpose of supervising the transportation of stolen property from defendant's house to the police station.

5. Officer Lee and four law officers entered the home, and each made an independent search. The forged prescriptions for drugs and stolen property were found by the law officers.

My heart does not bleed for the defendant. There is substantial evidence that she willfully violated two other probation conditions which would justify revocation of probation. But I think the 31 March 1980 raid was instigated and primarily conducted by law enforcement officers, who used the probation officer with her search power as a substitute for a search warrant, and that under the circumstances the search was unreasonable and in violation of both G.S. 15A-1343 and the

State v. Snowden and State v. Boggs

Fourth Amendment. The prescriptions for controlled substances found in the search should have been excluded. I vote to reverse.

STATE OF NORTH CAROLINA v. CURL GERNELL SNOWDEN AND
STATE OF NORTH CAROLINA v. JESSIE LEE BOGGS

No. 803SC1071

(Filed 21 April 1981)

1. Criminal Law § 66.17– improper out-of-court identification procedure – in-court identification not tainted

A witness's in-court identification of defendants was not tainted by an impermissibly suggestive out-of-court identification procedure where the witness, victim of an armed robbery, testified that defendants were the only people in the store; she watched them the entire time they were in the store; the lighting was good; the witness gave an accurate description of defendants prior to the impermissible out-of-court confrontation; and the witness identified defendants with a reasonable degree of certainty soon after the robbery.

2. Criminal Law § 99– trial court's conduct – no expression of opinion

There was no merit to defendants' contention that the trial court erred in taking an active role in their trial by expressing an opinion as to their guilt, since all but one of the challenged comments and actions occurred during the voir dire hearing in the absence of the jury; the question asked in front of the jury was a proper focusing of one of defendants' questions on cross-examination; and no general trend of hostility on the part of the judge was shown by the record.

3. Searches and Seizures § 11– vehicle stopped upon probable cause – seizure of items in plain view proper

There was no merit to defendants' contention that the trial court erred in not suppressing items seized from a motor vehicle in which defendants were riding because there was no probable cause to stop the vehicle, since testimony by an officer that he had been given a detailed description of the robbers, that he saw the car as he was leaving the crime scene approximately one and a half hours after commission of the robbery, and that the driver of the car appeared to fit the description of one of the robbers was sufficient to create in the officer an honest and reasonable suspicion that one or more of the occupants of the car had committed the armed robbery; therefore, stopping the car in which defendants were riding was lawful, and the property in plain view within the vehicle was lawfully seized and properly admitted into evidence.

State v. Snowden and State v. Boggs

APPEAL by defendants from *Fountain, Judge*. Judgment entered 19 June 1980 in Superior Court, PITT County. Heard in the Court of Appeals 11 March 1981.

Defendants were indicted for armed robbery. The State's evidence tended to show that on 20 April 1980 the defendants robbed the Stop-N-Go Store on Memorial Drive in Greenville, North Carolina, at gunpoint.

After a *voir dire* hearing on defendants' motions to suppress, the trial court allowed Sandra K. Williams, the clerk working at the Stop-N-Go the morning of the robbery, to identify the defendants. She testified that the defendants came into the store at approximately 2:40 a.m., and while defendant Snowden stood at the counter where she was standing, defendant Boggs went to one of the coolers, got milk from it and inquired about wine. Ms. Williams further testified that defendant Boggs then joined defendant Snowden at the counter where Ms. Williams stood and, after several minutes had passed, defendant Snowden drew a small pistol and demanded the money in the cash register. They then left the store taking approximately \$67, two cartons of cigarettes, cigarette lighters and the milk.

Several police officers testified concerning the stopping of the car in which defendants and the above described items were found. Ms. Williams' subsequent identification of the defendants at the car, as the persons who robbed her, was suppressed. The items found in the car, however, were admitted into evidence over defendants' objections.

The defendants offered no evidence other than the recalling of Ms. Williams.

Defendants were found guilty as charged and their motions in arrest of judgment and to set aside the verdict as being contrary to the weight of the evidence were denied. Defendants appealed.

Attorney General Edmisten, by Assistant Attorney General Acie L. Ward, for the State.

Dixon & Horne, by Stephen F. Horne, II, for defendant Jessie Lee Boggs.

Robert D. Rouse, III, for defendant Curl Gernell Snowden.

State v. Snowden and State v. Boggs

ARNOLD, Judge.

Defendants were represented by separate counsel at trial and they have filed separate briefs. Defendant Snowden's 12 assignments of error are identical to 12 of defendant Boggs' 14 assignments of error and, as their arguments are also identical, we will address these assignments jointly.

[1] Defendants' first assignments of error concern the admissibility, over their objections, of the in-court testimony of Sandra K. Williams. The defendants argue that this testimony was tainted by an out-of-court identification procedure conducted in an impermissibly suggestive manner.

It is well-established that the primary illegality of an out-of-court identification will render the in-court identification inadmissible unless it is first determined that the in-court identification is of an independent origin. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). In this case the trial judge conducted an extensive *voir dire* hearing and subsequently suppressed Ms. Williams' identification of defendants at the roadside confrontation. Therefore, the question before the court is whether under all of the circumstances the suggestive pretrial procedure gave rise to a substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977); *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979). It is the strong probability of misidentification which violates a defendant's right to due process.

Unnecessarily suggestive circumstances alone do not require the exclusion of identification evidence. Factors to be considered are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention during the commission of the crime; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the challenged confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). Against these factors are weighed the "corrupting influence" of any suggestive circumstances leading to, and surrounding, the contested identification. *Manson v. Brathwaite*, *supra*.

State v. Snowden and State v. Boggs

Applying these standards, we find ample evidence of inherent reliability in Ms. Williams' in-court identification of the defendants. She testified that they were the only ones in the store, she watched them the entire time, and the lighting was good. She gave an accurate description of the defendants prior to the confrontation on the street, and identified them with a reasonable degree of certainty soon after the robbery. These factors clearly outweigh the influence of the circumstances surrounding the roadside confrontation.

[2] Defendants' second assignment of error is that the trial court erred in taking an active role in the defendants' trial by expressing an opinion as to their guilt. The expression of an opinion by the trial judge can deprive an accused of a fair trial, but whether the challenged remarks were prejudicial must be determined by what was said, and its probable effect upon the jury in light of all attendant circumstances. The burden of showing prejudice is on the appellant. *State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979).

We find no prejudice has been shown. All but one of the challenged comments and actions occurred during the *voir dire* hearing in the absence of the jury. The question asked in front of the jury was a proper focusing of one of defendants' questions on cross-examination. Defendants further argue, however, that even if the judge's remarks were not prejudicial in themselves, an examination of the record indicates a general trend of hostility which had a cumulative effect of prejudice and therefore a new trial must be allowed. We disagree. No general trend of hostility is shown by the record, and defendants' contention in this regard is without merit. *See State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977).

[3] Defendants' next contention is that the trial court erred in not suppressing the items seized in the motor vehicle in which the defendants were riding in that there was no probable cause to stop the vehicle. They base their contention on the grounds that there was no evidence to indicate that the car in which they were stopped by the police was involved in a robbery, and that at the time it was stopped it was being operated in all respects in compliance with the law.

Detention, or "investigative custody," without probable

State v. Snowden and State v. Boggs

cause to make a warrantless arrest, is restricted by the Fourth Amendment prohibition of unreasonable search and seizure. *Davis v. Mississippi*, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969). There are well recognized exceptions to this rule, however, and, under certain circumstances, a police officer not aided by these exceptions can lawfully detain a suspect. *Terry v. Ohio*, 392 U.S. 1, 22, 20 L. Ed. 2d 889, 906-07, 88 S. Ct. 1868, 1880 (1968). In the situation where there is a need for immediate action and, upon personal observation or reliable information, the officer has an honest and reasonable suspicion that the suspect has either committed, or is preparing to commit a crime, the officer can lawfully stop that person in order to make an investigative inquiry. *Matter of Beddingfield*, 42 N.C. App. 712, 257 S.E. 2d 643 (1979); *State v. Bridges*, 35 N.C. App. 81, 239 S.E. 2d 856 (1978).

Officer Evans testified that he had been given a detailed description of the robbers; he saw the car as he was leaving the Stop-N-Go at approximately 4:00 a.m., and the driver of the car appeared to fit the description of one of the robbers. These facts are sufficient to create in Officer Evans an honest and reasonable suspicion that one or more of the occupants of the car had committed the armed robbery. We find, therefore, that stopping the car in which the defendants were riding was lawful, and the property in plain view within the vehicle was lawfully seized and properly admitted into evidence. *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976); *aff'd* 291 N.C. 505, 231 S.E. 2d 663 (1977); *Matter of Beddingfield*, *supra*.

Defendants also argue that evidence found during a search of defendant Snowden's person was illegally seized and improperly admitted. Having established that there was probable cause to stop the vehicle in which defendants were riding, it is clear that the search of defendant Snowden was lawful as a search incident to an arrest. *State v. Tilley*, 44 N.C. App. 313, 260 S.E. 2d 794 (1979).

We can further find no error in the judge's instructions, or in his denial of defendants' motions. Moreover, we have carefully considered all of defendant's remaining joint assignments of error, and defendant Boggs' two separate assignments, and find no merit in them.

Defendants' trial was free of prejudicial error.

In re Wake Forest University

No error.

Judges CLARK and MARTIN (Harry C.) concur.

IN THE MATTER OF: APPEAL OF THE FORSYTH COUNTY TAX
SUPERVISOR REGARDING CERTAIN PROPERTY OWNED BY WAKE
FOREST UNIVERSITY

No. 8010PTC844

(Filed 21 April 1981)

Taxation § 22.1— ad valorem taxation — university's football parking lot — rental to corporation — portion exempt from taxation

Where Wake Forest University granted a corporation an easement to use a football stadium parking lot for employee and visitor parking and general access to the corporation's headquarters building, the N.C. Property Tax Commission properly determined that a portion of the parking lot not regularly used by the corporation is wholly and exclusively used by Wake Forest University for educational purposes and is exempt from ad valorem taxation under G.S. 105-278.4(c).

APPEAL by respondent from an order of the North Carolina Property Tax Commission entered 24 March 1980. Heard in the Court of Appeals 12 March 1981.

Wake Forest University is an educational institution whose property generally qualifies for exemption from taxation under G.S. 105-278.4. Wake Forest owns a 48.65 acre tract of land in Winston-Salem, lying between the University's football stadium and the World Headquarters building of R.J. Reynolds Industries, Inc. (Reynolds). The tract of land is generally identified and will be referred to as the Grove's Stadium parking lot. In February, 1976, Wake Forest conveyed to Reynolds a non-exclusive easement and right to use the Grove's Stadium parking lot on a continuing basis for a period of forty years for ingress and egress (to its headquarters building) from adjacent streets, for automotive parking, and for other purposes incident to the Reynolds' business.

The consideration for the granting of the easement was the promise by Reynolds to donate to Wake Forest a sum sufficient to pave a substantial portion of the parking lot. The easement

In re Wake Forest University

contains provisions restricting Reynolds from constructing or placing any building on the parking lot other than accessory buildings normally associated with parking lot and stadium operations. The easement also requires Reynolds to maintain the paved portion of the parking lot. By separate agreement, Reynolds agreed to pay any ad valorem taxes assessed against the parking lot.

As of 1 January 1978, Forsyth County determined the appraised value of the Grove's Stadium parking lot to be \$1,653,500.00. This figure is not in dispute. The Forsyth County Board of Equalization and Review found a portion (twenty percent) of the parking lot to be exempt from taxation and reduced the tax valuation to \$1,113,710.00. Both the County and Reynolds appealed the decision of the County Board of Equalization and Review to the North Carolina Property Tax Commission. The Commission held a hearing and entered an order in which it reduced the tax valuation of the parking lot to \$501,171.00. Respondent County has appealed from the Commission's order.

County Attorney P. Eugene Price, Jr., and Assistant County Attorney Jonathan V. Maxwell, for Forsyth County Tax Supervisor appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by W.F. Maready and Grover G. Wilson, for R.J. Reynolds Industries, Inc., appellee.

WELLS, Judge.

The basic question before us on this appeal is whether any portion of the Grove's Stadium parking lot qualifies under the "split exemption" statute, G.S. 105-278.4(c). The applicable statute, in pertinent part, is as follows:

§105-278.4. *Real and personal property used for educational purposes.* — (a) Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if:

(1) Owned by an educational institution . . . ;

(b) Land (exclusive of improvements); and improvements other than buildings, the land actually occupied by such

In re Wake Forest University

improvements, and additional land reasonably necessary for the convenient use of any such improvements shall be exempted from taxation if:

- (1) Owned by an educational institution that owns real property entitled to exemption under the provisions of subsection (a), above;
 - (2) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and
 - (3) Wholly and exclusively used for educational purposes by the owner or occupied gratuitously [*sic*] by another nonprofit educational institution (as defined herein) and wholly and exclusively used by the occupant for nonprofit educational purposes.
- (c) Notwithstanding the exclusive-use requirements of subsections (a) and (b), above, if part of a property that otherwise meets the requirements of one of those subsections is used for a purpose that would require exemption if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

. . . .

The order of the Property Tax Commission included the following pertinent findings of fact:

- (2) Approximately 80% (38.65 acres) of the subject 48.65 acre tract is improved as a parking lot with 2,887 marked parking spaces.
- (3) The remaining 20% (10 acres) of the property, which is covered with trees and gullies, is fenced off from the parking lot and is not used by either Reynolds or the University.

. . . .

- (6) The subject parking lot is used by the University to provide parking for persons attending Wake Forest football games and certain other University functions, such as concerts.

In re Wake Forest University

- (7) Reynolds' employees and visitors use 1,036 (36%) of the 2,887 parking spaces each working day — Monday through Friday.

Respondent Forsyth County assigns as error those findings of fact included in paragraph numbered (7), contending that these findings are not supported by the evidence. The evidence before the Commission on this aspect of the case consisted of exhibits (maps) showing the vicinity, location, and configuration of the property; and the testimony of James T. Barg, the manager of Property Tax Administration for Reynolds and W. Harvey Pardue, Forsyth County Tax Supervisor. Barg, using the exhibits, testified that the area of the paved portion of the property where Reynolds' employees regularly park consists of 1,036 parking spaces, and that this constitutes approximately thirty-six percent of the paved area which includes a total of 2,887 spaces. Pardue testified that the parking lot is used five days a week by Reynolds for employee and visitor parking and for general access to Reynolds' headquarters building, and that on football weekends, the lot is filled with Wake Forst football traffic. This evidence clearly supports the disputed finding of fact, and the finding is therefore binding upon us on review. *In re Appeal of Amp. Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975).

The heart of respondent's argument is that the Commission's findings of fact and the evidence do not support the Commission's conclusion that the taxable value of the property should be reduced to \$501,171.00. For clarity, we quote the conclusionary portion of the Commission's order in its entirety:

CONCLUSION, DECISION AND ORDER

From our review of the applicable law, the evidence and our findings of fact, we conclude and so decide that all of the subject property except the portion actually used by Reynolds is exempt from taxes under the provisions of G.S. 105-278.4.

The parking lot is owned by the University — a qualifying owner — and used by it in connection with its athletic program. An athletic program is an integral and important part of the educational program of practically every college or university. As is the case with most other football facilities, also, the subject parking lot is actually used by the

In re Wake Forest University

university only a limited number of times each year. This limited use, however, does not in any way diminish the need for the facility on those occasions. Thus, the parking lot would be required by the University for its purposes whether or not Reynolds also made use of it.

Since Reynolds' use of a portion of the parking facility cannot be construed as incidental, we further conclude that this portion is not wholly and exclusively used by the owner for educational purposes.

Accordingly, we hold that 36% of the 38.65 acres improved as a parking lot and of the improvements thereon is subject to property taxes. The amount of the taxable property is \$501,171 — \$363,658 for the land and \$137,513 for the improvements.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Forsyth County Board of Equalization and Review is reversed to the extent that the valuation established thereby exceeds \$501,171.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Forsyth County taxing officials reduce the taxable value of the subject property to \$501,171 and enter said reduced valuation in the tax records of the County.

Respondent County contends that in order to qualify for exemption under the statute, Wake Forest must either (a) *wholly and exclusively* use all of the property, or (b) *wholly and exclusively* use a portion of the property, in which case only that portion so used qualifies for exemption. Respondent argues that because the easement agreement includes all of the property and because Reynolds' employees and visitors have free access to the entire parking lot, none of the property qualifies for exemption. We do not agree.

The decisions of our appellate courts have consistently recognized and enunciated the principle that it is not the nature or characteristic of the owning entity which ultimately determines whether property shall be exempt from taxation, but it is the use to which the property is dedicated which controls. *See, In re Forestry Foundation*, 296 N.C. 330, 250 S.E. 2d 236 (1979); *Redevelopment Comm. v. Guilford County*, 274 N.C. 585, 164 S.E.

In re Wake Forest University

2d 476 (1968); *Seminary, Inc. v. Wake County*, 251 N.C. 775, 112 S.E. 2d 528 (1960); *Rockingham County v. Elon College*, 219 N.C. 342, 13 S.E. 2d 618 (1941); *In re Land and Mineral Co.*, 49 N.C. App. 605, 272 S.E. 2d 878 (1980); but see, *In re University of North Carolina*, 300 N.C. 563, 268 S.E. 2d 472 (1980) (property owned by the State is exempt from ad valorem taxes solely by reason of State ownership regardless of the use to which the property is put). While the agreement between Wake Forest and Reynolds gives Reynolds an easement in and to the entire tract, the evidence is undisputed that Reynolds' use of the property is limited in both time and space. Conversely, the evidence is undisputed that Wake Forest is the dominant user of the portion of the property exempted by the Commission, and that in fact, on a regular basis, it uses the entire improved portion of the property. We assume, as no one has argued to the contrary, that the use of the lot for parking for Wake Forest football games is for educational purposes. The factual situation here is radically different from that found in *In re Forestry Foundation, Inc.*, *supra*, where evidence clearly showed that the entire property was being used primarily for non-exempt purposes.

While our courts have consistently held that tax exemption statutes must be strictly construed against exemption, they have also held that such statutes should not be given a narrow or stingy construction. See, *Cemetery, Inc. v. Rockingham County*, 273 N.C. 467, 469, 160 S.E. 2d 293, 295 (1968) and *Wake County v. Ingle*, 273 N.C. 343, 346, 160 S.E. 2d 62, 64 (1968) and cases cited in those opinions; see also, *In re Taxable Status of Property*, 45 N.C. App. 632, 263 S.E. 2d 838, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 684 (1980). The agreeable and practical parking arrangement between Reynolds and Wake Forest obviously has great benefit for both parties, and we believe that it fits reasonably and clearly within the purview of the "split-exemption" portion of the statute as set out in G.S. 105-278.4(c).

The effect of the Commission's order was to find and conclude that within the meaning of the statute, that portion of the property not regularly used by Reynolds is wholly and exclusively used by Wake Forest for educational purposes. We hold that when viewed in the light of the entire record, see *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977); *In re Land and Mineral Co.*, *supra*; *In re Appeal of Amp, Inc.*, *supra*, the Commission's findings, inferences, conclusions,

Condie v. Condie

and order are supported by competent, material, and substantial evidence and therefore may not be reversed or modified by us.

Affirmed.

Judges VAUGHN and BECTON concur.

JAMES DUANE CONDIE v. VALDA GERALDINE HARRIS CONDIE

No. 8014DC815

(Filed 21 April 1981)

1. Divorce and Alimony § 16.6—permanent alimony—abandonment—sufficiency of evidence

In an action for absolute divorce where defendant filed a counterclaim for permanent alimony on the ground of abandonment, evidence was sufficient to raise the reasonable inference that plaintiff brought the parties' cohabitation to an end without justification, without defendant's consent, and without any intention of resuming cohabitation at a later point, where such evidence tended to show that the parties were married in 1955, moved with their children to Chapel Hill in 1973, and did not suffer any serious marital problems until 1976 when problems arose concerning plaintiff's relationship with the wife of a friend; in 1976 the parties sold their property in Chapel Hill, purchased another piece of property in Hillsborough, and plaintiff moved into a trailer on the property with three of the children; defendant and the other children remained in Chapel Hill; defendant understood that she and the remaining children were to move to Hillsborough shortly; the parties never discussed the move as being a marriage separation, and defendant never agreed or consented to such a separation; defendant made several attempts to get the parties back together, including going to Hillsborough to see plaintiff and their sons as much as possible; and in June 1978 plaintiff told defendant that she definitely would not be moving to Hillsborough with the rest of the family.

2. Divorce and Alimony § 16.8—alimony—sufficiency of evidence to support award

Evidence was sufficient to support findings of fact by the trial court and the findings clearly demonstrated that plaintiff was the supporting spouse, defendant was the dependent spouse, plaintiff was financially capable of supporting defendant, and defendant needed \$349 sufficiently to meet her monthly obligations; thus, the court could properly conclude that plaintiff should provide defendant with \$250 per month as reasonable support.

Condle v. Condle

3. Appeal and Error § 16.1; Rules of Civil Procedure § 58 – signing of judgment – trial court’s authority – order entered after notice of appeal given

Where the judgment requiring plaintiff to pay permanent alimony was “entered” in open court on 16 April 1980, and notice of appeal from this judgment was timely given, the trial judge had authority under G.S. 1A-1, Rule 58 to approve the form of the judgment and to direct its prompt preparation and filing, and she properly exercised that authority when she approved the written judgment and signed it on 20 May 1980 and when the judgment was filed on 30 May 1980; however, the trial judge did not have authority to enter an order dated 29 July 1980 requiring plaintiff to pay an attorney’s fee, since no mention of an attorney’s fee was made in the judgment entered 16 April 1980, no reference was made to an attorney’s fee in the judgment signed by the judge on 20 May 1980, and the trial judge could not enter an order in the cause since the matter was on appeal pursuant to the notice of appeal given 28 April 1980.

APPEAL by plaintiff from *Galloway, Judge*. Judgment entered 16 April 1980 in District Court, DURHAM County. Heard in the Court of Appeals 10 March 1981.

This is a civil action instituted by plaintiff seeking an absolute divorce from defendant. In a complaint filed 15 October 1979, plaintiff alleged that after approximately 23 years of marriage, he and defendant separated “with the intent to remain permanently separated” on or about 24 August 1978, and that the parties have continued to live separate and apart, with no resumption of the marital relation. Defendant filed answer, admitting the separation, and also filed a counterclaim seeking, *inter alia*, alimony *pendente lite*, custody of the minor children of the marriage, reasonable attorney’s fees, and permanent alimony, on the grounds of abandonment. Defendant requested a trial by jury on her claim for permanent alimony.

On 12 December 1979, the court entered a judgment granting plaintiff an absolute divorce from defendant, and on 11 February 1980, the court entered an order denying defendant alimony *pendente lite* and awarding defendant an attorney’s fee of \$560, but awarding custody of the minor children jointly to both parties. Thereafter, the case proceeded to trial before a jury upon defendant’s counterclaim for permanent alimony.

The jury found that plaintiff had “abandoned” defendant “without just cause or provocation or without the consent” of defendant. The court, after finding that defendant was a dependent spouse and that plaintiff was a supporting spouse, and

Condle v. Condle

after a hearing on plaintiff's financial standing, entered the following "Decision of the Court" into the record on 16 April 1980:

The Court, after hearing all the evidence in the case has decided that Mrs. Condle is a dependent spouse within the meaning of the statute, and Mr. Condle is the supporting spouse. According to the verdict of the Jury in this case, they have found that there was abandonment, which entitles Mrs. Condle to permanent alimony. Based upon the monthly expenses and capability of Mr. Condle and the needs of Mrs. Condle, the Court will require that Mr. Condle pay to the benefit of Mrs. Condle the amount of \$250.00 a month permanent alimony.

Plaintiff gave notice of appeal on 28 April 1980.

On 20 May 1980 the trial judge signed a judgment which, *inter alia*, made the following findings of fact with respect to the financial ability and needs of the parties:

1. That the plaintiff is an able-bodied person, having the job or position of Assistant Director of Housing at University of North Carolina at Chapel Hill, and he has held this position for several years.

2. That the gross income of the plaintiff is in excess of \$2,600 per month, and that his annual income is approximately \$33,000.

3. That the plaintiff has a post-college or graduate education and, in addition to his college degree, he holds graduate degrees at the Masters and Doctorate levels.

4. That the defendant is employed by Blue Cross and Blue Shield in the Chapel Hill area, and earns net or take-home pay of \$450 per month.

5. That the [defendant] has a high school education and she has not completed any education beyond that stage.

6. That the defendant has monthly expenses which exceed her net or spendable income by \$349.07 per month.

7. That the defendant received some contributions from her daughter, Patti, who lives with her, such contributions being approximately \$100 per month.

Condie v. Condie

8. That the plaintiff has numerous debts and obligations upon a monthly basis, one of which is a monthly contribution to the Mormon Church of \$180, and that the plaintiff also receives \$65 per month from one of his sons in order to pay upon one of his loans from the State Employees Credit Union.

9. That since August of 1979 the defendant has received no support from the plaintiff, and that her only source of income other than her earnings and her daughter's contributions had been in the form of a subsidy from the Mormon Church, which has been paying for the defendant's rent since August of 1979.

10. That the defendant is actually substantially dependent upon the plaintiff for her maintenance and support since her monthly obligations exceed her available monthly income by \$349.00.

Based upon the jury verdict and her findings, the trial judge ordered plaintiff to pay permanent alimony to defendant in the amount of \$250 per month. Thereafter, on 29 July 1980, Judge Galloway made findings and conclusions and ordered plaintiff to pay defendant an attorney's fee in the sum of \$2,035.

Grover C. McCain, Jr., and Archbell & Cotter, by James B. Archbell, for the plaintiff appellant.

Levine and Stewart, by Michael D. Levine, for the defendant appellee.

HEDRICK, Judge.

[1] Plaintiff contends, based upon his first assignment of error, that the court erred in denying his motions for a directed verdict with respect to defendant's counterclaim. He argues that the evidence presented is insufficient to show abandonment of defendant by plaintiff, but does sufficiently show separation by consent. We do not agree.

One spouse abandons the other spouse, within the meaning of the statute establishing abandonment as one of the grounds entitling a dependent spouse to alimony (G.S. § 50-16.2), where the spouse brings the cohabitation to an end without justification, without the consent of the other spouse, and without the intent of renewing the cohabitation. *Panhorst v. Panhorst*, 277

Condie v. Condie

N.C. 664, 178 S.E. 2d 387 (1971). The evidence in the present case, when construed in the light most favorable to defendant, tends to show the following:

Plaintiff and defendant were married in June of 1955. In 1973, plaintiff, defendant, and their six children moved to Chapel Hill. The parties did not suffer any serious marital problems until 1976, when problems arose concerning plaintiff's relationship with the wife of a friend. Also in 1976, the parties sold their property in Chapel Hill, and purchased another piece of property in Hillsborough because defendant felt that relocation of the family would relieve some of the financial pressures the family was feeling, and some of the physical strain plaintiff was experiencing with his job. The property had a two bedroom mobile home on it, and in August 1976 plaintiff, with defendant's assistance, moved into the trailer with three of their sons. Defendant and their daughters remained in Chapel Hill. Defendant reluctantly agreed to the move since she understood that she and their daughters were to move there shortly, once an addition could be built on the mobile home to accommodate them. Although the parties had been having some marital difficulties, they had never discussed the move as being a marriage separation, and defendant never agreed or consented to such a separation. Plaintiff did show defendant some plans for a proposed addition to the mobile home several months later, but no addition was ever built.

After the move, the family remained in close contact and the parties remained intimate for several months, but strains soon developed in the marriage. When defendant would go to the home in Hillsborough, plaintiff would leave the room when she came in, or in some cases he would leave the trailer. Plaintiff's visits to see defendant and their daughters in Chapel Hill became less and less frequent until the visits stopped altogether. Plaintiff never told defendant why she could not move to Hillsborough, other than simply stating that "it would not be a good thing to do," and defendant knew of nothing she had done to prevent him from wanting her to move to Hillsborough.

The parties began attending marriage counseling sessions in October 1976, continuing into January 1977. Though defendant was using the sessions in an attempt to "preserve the

Condle v. Condle

marriage," plaintiff told her that he did not love her and had not loved her for ten years. After this time, defendant continued in her attempts to get the parties "back together," including going to Hillsborough to see plaintiff and their sons as much as possible, but plaintiff stated he needed more time and refused her offers to live together. The first time that plaintiff told defendant that she definitely would not be moving to Hillsborough with the rest of the family was in June 1978. Plaintiff began dating another woman, but defendant never thought that the marriage "had gone so far that it could not be fixed" until the divorce was granted and plaintiff had remarried.

We think this evidence is sufficient to raise the reasonable inference that plaintiff brought the parties' cohabitation to an end without justification, without defendant's consent, and without any intention of resuming cohabitation at a later point. The trial judge thus properly submitted the issue of abandonment to the jury, and this assignment of error is without merit.

[2] Based upon his second and fourth assignments of error, plaintiff contends, in substance, that the evidence does not support the findings of fact, and that these findings in turn are insufficient and do not support the conclusions of law drawn therefrom. We disagree. The findings challenged by plaintiff relate to the excess of defendant's monthly expenses over her monthly income, and her dependence on plaintiff for that difference. The parties stipulated that defendant's expenses exceeded her income by \$349.07 per month, and the record contains ample competent evidence that defendant had no other means with which to defray the excess expenses. We hold that the evidence is sufficient to support the challenged findings, as well as the other findings of fact made by the trial judge. The findings of fact, in turn, are sufficient and they support the conclusions of law made by the trial judge. The findings clearly demonstrate that plaintiff is the supporting spouse, that defendant is the dependent spouse, that plaintiff is financially capable of supporting defendant, and that defendant needs \$349 to sufficiently meet her monthly obligations. Thus, the court could properly conclude that plaintiff should provide defendant with \$250 per month as reasonable support. The findings and conclusions therefore support the order requiring plaintiff to pay defendant \$250 per month as permanent alimony, and these assignments of error are not sustained.

Condie v. Condie

[3] By his third and fifth assignments of error, plaintiff challenges the authority of the trial judge, Judge Galloway, to sign the judgment on 20 May 1980, and to sign the order with respect to attorney's fees on 29 July 1980. G.S. § 1A-1, Rule 58 in pertinent part provides:

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

The record before us clearly discloses that the judgment requiring plaintiff to pay permanent alimony in the amount of \$250 per month was "entered" in open court on 16 April 1980. Notice of appeal from this judgment was timely given in accordance with G.S. § 1-279 and Rules 3(c) and 27(a) of the Rules of Appellate Procedure. Judge Galloway signed the written judgment on 20 May 1980, and the written judgment was filed 30 May 1980. We hold that the record discloses that Judge Galloway had the authority under G.S. § 1A-1, Rule 58 to approve the form of the judgment and to direct its prompt preparation and filing, and that she properly exercised that authority when she approved the written judgment and signed it on 20 May 1980, and when the judgment was filed on 30 May 1980.

We also hold, however, that the record affirmatively discloses that Judge Galloway had *no* authority to enter the order dated 29 July 1980 requiring plaintiff to pay an attorney's fee. Although defendant sought an attorney's fee in her counterclaim, and even obtained an order for an attorney's fee *pendente lite*, no mention of an attorney's fee was made in the judgment entered 16 April 1980. Furthermore, no reference was made to an attorney's fee in the judgment signed by Judge Galloway on 20 May 1980. In addition, the record before us does not indicate that Judge Galloway was assigned to preside over the session of court on 29 July 1980, as would be required by G.S. § 7A-192 before Judge Galloway could enter the order. Assuming *arguendo* that the case was properly calendared for hearing a motion in the cause, and there is nothing to indicate that such a motion was made or that plaintiff had notice of such a motion, Judge Galloway was *functus officio* to enter any order in the cause,

First Citizens Bank v. Holland

since the matter was on appeal pursuant to the notice of appeal given 28 April 1980. *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724 (1962); *Carpenter v. Carpenter*, 25 N.C. App. 307, 212 S.E. 2d 915 (1975). Thus, the order entered 29 July 1980 requiring plaintiff to pay an attorney's fee in the amount of \$2,035 must be vacated.

The result is: The judgment entered on 16 April 1980, and signed on 20 May 1980 and filed on 30 May 1980, requiring plaintiff to pay permanent alimony in the amount of \$250 per month is affirmed; the order entered 29 July 1980 requiring plaintiff to pay an attorney's fee in the amount of \$2,035 is vacated.

Affirmed in part; vacated in part.

Judges WEBB and HILL concur.

FIRST CITIZENS BANK & TRUST COMPANY v. C. DOUGLAS
HOLLAND AND CHRISTINE P. HOLLAND

No. 8010SC785

(Filed 21 April 1981)

Bills and Notes § 19— action on promissory note – defenses – summary judgment improper

In an action to recover on two promissory notes executed by defendant and made payable to plaintiff, the trial court erred in entering summary judgment for plaintiff where defendant alleged in his answer, deposition, and affidavit matters which tended to show that defendant, a CPA, became acquainted with and had business dealings with an officer of plaintiff; defendant signed the notes in question because the officer told him that he needed to sign them in order to help the officer, defendant, and plaintiff; defendant's affidavit indicated that some of the reasons he was told for having him sign the notes were that "the bank needed to clear its records" and that the officer with whom defendant dealt "had embezzled the money and that it would benefit him and [defendant] in the FBI felony investigation"; defendant never received either of the notes in question and he thought the notes were made payable to plaintiff's officer with whom he had dealt; and the notes, together with a determination of the relationship between the officer with whom defendant dealt and plaintiff with respect to the notes, would enable the court to determine whether the notes sued upon were executed and delivered illegally, under duress, through fraud, or without consideration.

First Citizens Bank v. Holland

APPEAL by defendant C. Douglas Holland from *Britt, Judge*. Judgment entered 30 April 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 5 March 1981.

This is a civil action wherein plaintiff seeks to recover on two promissory notes in the amounts of \$41,300 and \$24,070 respectively which were executed by defendant Douglas Holland and made payable to plaintiff. Plaintiff also seeks to recover on these notes under a guaranty agreement executed by defendant Christine Holland.

Defendants filed answer, admitting the execution and delivery of the notes to plaintiff, but alleging certain defenses which will be hereinafter discussed. Plaintiff filed a motion for summary judgment, supporting its motion with the affidavit of Dolph U. Kemp, Vice President in the Installment Loan Division of plaintiff, as to the execution of the notes. In opposition to the motion, defendants offered the deposition of defendant Douglas Holland, along with an affidavit, both of which will be discussed in more detail at a later point. From summary judgment in favor of plaintiff on both notes against defendant Douglas Holland, defendant Douglas Holland appealed.

Ward & Smith, by Thomas E. Harris and Kenneth R. Wooten, for the plaintiff appellee.

Boyce, Mitchell, Burns & Smith, by G. Eugene Boyce and James M. Day, for the defendant appellant.

HEDRICK, Judge.

Defendant Douglas Holland (hereinafter "defendant") assigns error to the court's entry of summary judgment in favor of plaintiff.

Summary judgment must be granted, upon motion, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c). Furthermore, when the movant, as here, is the party with the burden of proof, summary judgment may be granted in his favor on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) where the opposing party has failed to introduce any materials in his

First Citizens Bank v. Holland

favor, failed to point to specific areas of impeachment and contradiction, and failed to use G.S. § 1A-1, Rule 56(f); and (3) when summary judgment is otherwise appropriate. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

We note at the outset that only latent doubts have been raised as to the credibility of plaintiff's affiant, Dolph Kemp. Kemp's affidavit refers to matters which have been admitted by defendant, and contains nothing which would raise any question as to his credibility. We thus proceed to determine whether the other requirements of *Kidd v. Early*, *supra*, have been met in this case.

In his answer to plaintiff's claims on the two promissory notes defendant alleged, *inter alia*, (1) "want of consideration" with respect to the notes; (2) the execution of the notes was "induced by trickery, fraud, and undue influence," in that plaintiff's agents made false, material and deceiving representations to defendant that he had to sign the notes in order to "get the bank's records straight," to "satisfy" state and federal bank officials," and to alter the results of "an impending federal investigation" of plaintiff, and also because defendant "might be criminally prosecuted;" (3) the notes were obtained for the "illegal purpose" of giving a "false representation" of plaintiff's financial condition "with respect to substantial losses sustained by reason of employee defalcations" in order to "suppress and conceal criminal offenses and violations of banking regulations" by plaintiff and its employees; (4) the notes were "given in contravention of public policy ... to repay moneys embezzled by persons other than" defendant so as to "conceal from the public the circumstances of said embezzlement ...;" and (5) the notes were obtained not only under "threats and intimations of prosecution" but also upon promises that execution "would suppress or tend to suppress prosecution and criminal punishment" of defendant and that execution would "mitigate" the punishment of plaintiff's employees and agents.

Defendant cannot, of course, merely depend upon his pleadings to successfully oppose plaintiff's motion for summary judgment. Once a motion for summary judgment has been made and supported as provided by G.S. § 1A-1, Rule 56, the opposing party may not rest upon the mere allegations and denials of his pleadings, but must come forth, by affidavits or as otherwise

First Citizens Bank v. Holland

provided in Rule 56, with specific facts showing that a genuine issue for trial exists. G.S. § 1A-1, Rule 56(e); *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E. 2d 54 (1980). In the case *sub judice*, defendant did not rely solely on his pleadings, but opposed plaintiff's motion for summary judgment with his deposition testimony, which tends to show the following:

Defendant, a certified public accountant (CPA), became acquainted with Sam Hudson, an officer of plaintiff, sometime before 1970 through the church to which both men belonged. During either 1968 or 1969, Hudson helped defendant in establishing a business relationship with plaintiff for the purpose of obtaining short-term working capital loans for defendant's business. Hudson also helped defendant get several automobile loans from plaintiff.

Around 1973, defendant also began a course of dealing with Hudson on a personal basis. Hudson and defendant entered into a series of transactions with a third party, Larry Woodhouse, by which defendant would act as a "conduit" for funds flowing from Hudson to Woodhouse for use in certain businesses run by Woodhouse. These transactions typically worked as follows: In exchange for a promissory note executed by defendant, Hudson would deliver funds to defendant's CPA account with plaintiff by cashier's check drawn on plaintiff's Installment Loan Department. Defendant never read the promissory notes he was signing, since he trusted Hudson and Hudson represented that the notes were made payable to Hudson. Defendant would then take the funds and "lend" them to Woodhouse, usually on a short term basis. On one occasion, defendant collected a \$5,000 "fee" for Hudson from Woodhouse, in accordance with the "specified fee" of ten percent charged to Woodhouse for the use of the funds.

As part of these transactions, defendant executed two promissory notes, in the amounts of \$35,000 and \$40,000 respectively, both of which defendant presumed were payable to Hudson. Defendant never saw these notes after he executed them. With respect to the \$35,000 note, defendant took the funds delivered by Hudson in exchange for the note, and delivered them to Woodhouse. Woodhouse "repaid" the funds to defendant several times, but defendant would subsequently "re-lend" the funds again, until the money was delivered to Woodhouse a final

First Citizens Bank v. Holland

time and never repaid. The \$40,000 note was executed sometime after the \$35,000 note, and following the delivery of these funds to Woodhouse, defendant received a notice from plaintiff that he owed the bank on a \$40,000 note. Defendant was quite surprised at this, since he believed that he had personally obligated himself to Hudson, not the bank, for the \$40,000. Defendant called Hudson to find out what was going on, and Hudson told defendant that there had been "a lot of tightening up on loans and things within the Bank, and that he had to put this in. . . ."

Thereafter, defendant had several meetings with officials of plaintiff. The officials sought to have defendant sign a new note to replace the \$40,000 note, and when defendant informed the officials as to the \$35,000 note, the officials sought to have defendant sign a new note to replace that obligation as well. Hudson had told defendant that defendant needed to sign the new notes in order to help Hudson, defendant, and plaintiff. Defendant asked one of the officials, a Mr. McClain, if it would indeed help everybody if defendant signed the notes, to which McClain replied, "Yes." Defendant knew that at that time the FBI was conducting an investigation into Hudson's dealings as an official of plaintiff. Defendant was told "that the Bank is looking into all these deals and that they were looking into him." Nevertheless, because plaintiff and defendant had had a "tremendous relationship" up to that time, and defendant was interested in maintaining that relationship due to the number of clients he had who used plaintiff's services, defendant "got the impression that they would still allow me to remain as a customer and work with them, and such as that, if I would kind of go along with this, because that would help the situation."

Since defendant "knew that some money had gone through me and that it wasn't all repaid, and that it would help the people involved if I'd say it was mine," defendant then executed the two new notes, on 25 October 1976 and 22 November 1976 respectively, which are the subject of this lawsuit. The proceeds of the 25 October 1976 note, in the amount of \$41,300, were to be used to "pay down" the outstanding balance on the \$35,000 note (\$35,000 principal plus \$6,300 accumulated interest). The proceeds of the 22 November 1976 note, in the amount of \$24,070, were to be used to "pay down" the outstanding balance on the \$40,000 note which remained after defendant made a partial payment of about \$25,000. Defendant never saw the original

First Citizens Bank v. Holland

\$35,000 and \$40,000 notes during the course of the meetings with the officials of plaintiff, and those notes were never delivered to him as "paid" after the proceeds of the \$41,300 and \$24,070 notes were presumably used to pay off the old notes.

Defendant expected that the new notes would be used "for whatever purpose they need to get that FBI man off their back." Defendant did not think it unusual that he had to pledge collateral for the new notes, since "that would look better to the people who were examining [the notes]." After the execution of the new notes, defendant was unable to get the funds owed him by Woodhouse, and plaintiff made only one effort to get Woodhouse to pay on the obligations. Defendant never expected plaintiff to demand payment on the new notes, so he never made any payments on them.

Defendant also opposed plaintiff's motion for summary judgment with an affidavit signed by defendant which supported the facts presented in his deposition. The affidavit indicated that "some of the reasons" which defendant was told for having him sign the new notes were that "the bank needed to clear its records" and that "Mr. Hudson had embezzled the money and that it would benefit him and [defendant] in the FBI's felony investigation." The affidavit also stated that defendant was acting as an agent for Woodhouse, a fully disclosed principal known to plaintiff and its agent, Hudson, such that defendant had no liability on the notes.

In our opinion, defendant has not "failed to introduce any materials in his favor." The materials he introduced, the deposition and the affidavit, raise a genuine issue of fact as to the relationship between Hudson and plaintiff with respect to the \$35,000 and \$40,000 notes, which were allegedly paid off with the proceeds of the notes sued upon. We think it particularly significant that defendant testified that he never received either the \$35,000 note or the \$40,000 note, and that he thought those notes were made payable to Hudson. These notes (the \$35,000 and \$40,000 notes), together with the determination of the relationship between Hudson and plaintiff with respect to these notes, would enable the court to determine whether the notes sued upon were executed and delivered illegally, under duress, through fraud, or without consideration.

We note that plaintiff has argued that it is the holder of two

Gillespie v. American Motors Corp.

negotiable instruments as evidenced by the \$41,300 and \$24,070 notes, but we find this to be of no consequence. Even assuming that plaintiff could achieve the most protected status of holder in due course under G.S. § 25-3-302, plaintiff could not take free of any of the defenses raised by defendant's materials, and thus could not defeat such defenses as a matter of law, since plaintiff dealt with defendant in the execution of the notes. G.S. § 25-3-305(2).

Because defendant has introduced materials in his favor complying with the dictates of Rule 56(e) and *Kidd v. Early*, *supra*, and because his deposition testimony and affidavit raise a genuine issue of material fact as to the relationship of Hudson to plaintiff with respect to the \$35,000 and \$40,000 notes, summary judgment for plaintiff was not appropriate in this case.

Reversed and remanded.

Judges WEBB and HILL concur.

JOY O. GILLESPIE AND BAILEY GILLESPIE v. AMERICAN MOTORS CORPORATION, AMERICAN MOTORS SALES CORPORATION, JEEP CORPORATION AND VALLEY MOTORS SALES, INC.

No. 8029SC603

(Filed 21 April 1981)

1. Limitation of Actions § 3.1— action barred by statute of limitations – no revival by legislature

Once a claim is barred by the running of the applicable statute of limitations, it cannot be revived by a subsequent action of the legislature.

2. Limitation of Actions § 4.2— claims based on negligence and strict liability not barred as matter of law

The trial court erred in dismissing plaintiffs' negligence and strict liability claims instituted in 1979 for personal injuries allegedly caused by the defective condition of a vehicle purchased from defendant dealer on the ground that the claims were barred by the three year limitation of former G.S. 1-15(b) where plaintiffs alleged that the link between their physical injuries and gas fumes in the vehicle was not discovered until 1978, since the claim did not accrue until the injury was discovered or ought reasonably to have been discovered, and whether plaintiffs' should have discovered the invasion of their legal rights prior to 1978 was a question for the jury.

Gillespie v. American Motors Corp.

3. Sales § 14.1; Uniform Commercial Code § 25—statute of limitations – breach of warranty in automobile sale

An action for breach of warranty in the sale of an automobile was governed by the four-year statute of limitations of G.S. 25-2-725, and plaintiffs' action was not barred where it was brought within four years after taking delivery of the vehicle.

APPEAL by plaintiff from *Howell, Judge*. Judgment entered 18 April 1980 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 13 January 1981.

Plaintiffs filed the complaint in this action on 18 December 1979 seeking damages for personal injuries to both plaintiffs and expenses associated with the defective condition of a 1976 Jeep Cherokee wagon purchased by plaintiffs from defendant Valley Motor Sales, Inc., and manufactured by defendant Jeep Corporation, a subsidiary of defendant American Motors Corporation. Plaintiff asserted three causes of action based respectively on defendants' negligence, defendants' breach of warranties pursuant to the sales contract for the vehicle, and strict liability due to the inherently dangerous nature of the product.

The substance of the complaint is that plaintiffs purchased the Jeep wagon from defendant Valley Motor Sales and nine days later discovered the presence of overwhelming gas fumes in the passenger compartment of the vehicle. Plaintiffs allege that after three years of repeated trips to defendant Valley Sales for work on the defective condition, the fumes persisted, and plaintiffs gave verbal notice to American Motors Sales Corporation of the alleged breaches of warranties, followed by written notice of the breaches.

Plaintiffs alleged, and provided affidavits in support of their contention, that the gas fumes in the vehicle over a period of four years resulted in physical injuries to both plaintiffs, and much expense in plaintiffs' attempts to have the defect corrected.

Defendants filed motions to dismiss plaintiffs' claim under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief could be granted, and because plaintiffs' claim was barred by the applicable statutes of limitation. The trial judge granted defendants' motions on the latter grounds, from which ruling plaintiffs appeal.

Gillespie v. American Motors Corp.

Tomblin & Perry, by A. Clyde Tomblin and Vance M. Perry, for plaintiff appellants.

Mullen, Holland & Harrell, by Graham C. Mullen, for defendant appellees American Motors Corporation, American Motors Sales Corporation and Jeep Corporation.

Golding, Crews, Meekins, Gordon & Gray, by Marvin K. Gray and Ned A. Stiles, and Hamrick, Bowen, Nanney & Dalton, by Fred D. Hamrick, Jr., for defendant appellee Valley Motor Sales, Inc.

ARNOLD, Judge.

The question which plaintiffs bring to this Court for review is whether their claims are barred by the statutes of limitation. It is urged that the negligence and strict liability causes of action were brought well within the six-year statute of limitations for product liability, as set out in G.S. 1-50(6). Plaintiffs further contend that the action was timely under G.S. 1-52(5), which prescribes a three-year statute of limitations for injury to the person not arising on contract, but limited by G.S. 1-52(16), which provides that such actions do not accrue until bodily harm or physical damage "becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." Plaintiffs also argue that the cause of action for breach of warranty was filed within the three years allowed by G.S. 1-52(1) and as expanded by our decision in *Styron v. Supply Co.*, 6 N.C. App. 675, 171 S.E. 2d 41 (1969), regarding the continued unsuccessful attempts to repair the object of a repair contract.

Defendants aver that since the sale was made, and the defect in the vehicle was discovered prior to the effective date of the statutes urged by plaintiffs, the predecessor, G.S. 1-15(b) (repealed effective 1 October 1979) applies as a bar to plaintiffs' suit under all three causes of action. Defendants claim that under the proper interpretation of G.S. 1-15(b), the three-year period accrued at the time the defect in the vehicle was discovered and, therefore, the statute ran long before this suit was filed. Defendants argue further that the claim could not be revived by the legislature through the enactment of G.S. 1-50(6) and 1-52(5) and (16).

Gillespie v. American Motors Corp.

[1] We agree that once a claim is barred by the running of the applicable statute of limitations, it cannot be revived by a subsequent action of the legislature. *Stereo Center, Inc. v. Hodson*, 39 N.C. App. 591, 251 S.E. 2d 673 (1979). The central issue in this case therefore is whether G.S. 1-15(b) would have operated to bar plaintiffs' action prior to the enactment of its successor, 1-52(16), and G.S. 1-50(6).

G.S. 1-15(b) provides: "Except where otherwise provided by statute, a cause of action, . . . having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs. . . ."

[2] Plaintiffs alleged that the link between their physical injuries and the gas fumes in the vehicle was not discovered until 1978. Whether plaintiffs should have discovered the invasion of their legal rights prior to 1978 is a question for the jury and may not form the basis of defendants' motion to dismiss. *Johnson v. Podger*, 43 N.C. App. 20, 25, 257 S.E. 2d 684, 689, *disc. rev. denied* 298 N.C. 806, 261 S.E. 2d 920 (1979); *see generally, Lauerma, The Accrual and Limitations of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina*, 8 Wake Forest L. Rev. 327 (1972). Assuming plaintiffs filed this action within three years from the time the action accrued, the action would not be barred by the statute of limitations in G.S. 1-52. If the plaintiffs' action was not barred, the legislature was at liberty to extend the time within which plaintiffs' rights could be asserted by enactment of 1-50(6). *Stereo Center, Inc. v. Hodson, supra*. Plaintiffs' causes of action based on the theories of negligence and strict liability were therefore improperly dismissed by the trial judge.

[3] We likewise find that the plaintiffs' cause of action for breach of warranties was improperly dismissed. The term "goods" includes an automobile within the meaning of G.S. 25-2-105 of the Uniform Commercial Code. *Rose v. Epley Motor Sales*, 288 N.C. 53, 60, 215 S.E. 2d 573, 577 (1975). The applicable statute of limitation is thus covered by G.S. 25-2-725(1) and (2):

(1) An action for breach of any contract for sale must be

American Clipper Corp. v. Howerton

commenced within four years after the cause of action has accrued.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A *breach of warranty* occurs when tender of *delivery* is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered. (Emphasis added.)

It is uncontradicted that plaintiffs filed their complaint, though by only a few days, within four years after taking delivery of the automobile. Consequently, the judgment dismissing plaintiffs' claims must be

Reversed.

Judges WELLS and HILL concur.

AMERICAN CLIPPER CORPORATION v. WALTER SCOTT HOWERTON
AND FINANCEAMERICA CORPORATION

No. 8018SC674

(Filed 21 April 1981)

Automobiles § 5—sale of new recreational vehicle — failure to deliver manufacturer's statement of origin — holder of title

In an action for a declaratory judgment to determine the right to ownership, title, possession or a security interest in a recreational vehicle as between plaintiff-manufacturer and defendant-consumer financier, the trial court properly entered summary judgment for plaintiff where the stipulated facts and partial settlement agreement entered into by the parties tended to show that the manufacturers' statements of origin were at all times in the possession of plaintiff; the seller with whom plaintiff had a consignment arrangement sold the vehicle without assigning the manufacturers' statements of origin to defendant-consumer as required under G.S. 20-52.1(c); defendant-financier loaned money and took a security interest in the vehicle without taking possession of the manufacturers' statements of origin or even inquiring about their whereabouts; in all respects, the transactions involving the vehicle were conducted in violation of G.S. 20-52.1; under the statute record title to the new vehicle could not "pass or vest" until the manufacturers' statements of origin were properly assigned; and record, paper title therefore remained in the name of plaintiff-manufacturer.

American Clipper Corp. v. Howerton

APPEAL by defendant from *Riddle, Judge*. Judgment entered 6 June 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 February 1981.

Plaintiff brought this action for a Declaratory Judgment pursuant to G.S. 1-253 to determine the right to ownership, title, possession or a security interest in a recreational vehicle as between the plaintiff-manufacturer and the defendant-consumer financier. Plaintiff prevailed in the trial court.

The facts upon which the trial judge based his Declaratory Judgment were stipulated to by the parties. Plaintiff, American Clipper Corporation [Clipper] purchased a chassis, motor, and transmission from Chrysler Corporation [Chrysler] for installation in one of its own Clipper Recreational Vehicles. Clipper received from Chrysler a manufacturer statement of origin [Chrysler MSO] for the parts purchased; completed manufacture of the recreational vehicle; assigned the vehicle a Clipper serial number; and shipped the vehicle, the Chrysler MSO and its own supplemental MSO to one of its dealers in Maryland. The Maryland dealer denied having ordered the vehicle and refused to accept it. After this refusal, the original (Chrysler) MSO was destroyed, and Clipper requested, received, and held onto a duplicate MSO from Chrysler.

Rather than shipping the vehicle back to its California plant, Clipper shipped the vehicle to a North Carolina dealership, Adventure America, Inc. [Adventure] on 10 October 1978. Clipper and Adventure had a prior course of business dealing, and this shipment was not unusual. Accompanying the vehicle was a written document from Clipper revealing a purchase price of \$15,076 and a statement that "[t]his is not a [sic] invoice. . . ." Instructional material, an owner's manual, and Clipper and Chrysler warranty forms were included with the vehicle, but the duplicate Chrysler MSO and Clipper supplemental MSO which are usually issued by Clipper to its dealer-purchaser, remained in the possession of Clipper. Clipper considered this transaction with Adventure to be a consignment and kept the vehicle on its own inventory list. Clipper was willing to sell the vehicle to Adventure at Adventure's option, but no money ever exchanged hands between Adventure and Clipper with regard to this vehicle. The understanding between the two was that Clipper could reclaim possession of the vehicle

American Clipper Corp. v. Howerton

at any time prior to Adventure's accepting Clipper's offer to sell for the specific price of \$15,076.

It was understood between Clipper and Adventure that Adventure would show the vehicle to potential purchasers at a price of its own choosing and would try to find a willing buyer. Once a buyer was found, Adventure would notify Clipper and accept Clipper's offer to sell. From October 1978 until June 1979, periodic telephone contacts between Clipper and Adventure resulted in assurances to Clipper that the vehicle was still on Adventure's lot. On 12 April 1979 however, Adventure entered into a Consumer Credit Installment Sales Contract with defendant, Walter Scott Howerton, for the purchase of the Clipper Recreational Vehicle at a price of \$20,799. Howerton made a \$2,034 down payment and was given \$3,265 as a trade-in credit for his 1977 Plymouth van; this left a cash balance of \$15,500. As a "buyer in the ordinary course of business" from Adventure as defined by the North Carolina Uniform Commercial Code, G.S. 25-1-201(9), Howerton, with the assistance of Adventure, applied for a North Carolina Certificate of Title and obtained a 20-day temporary registration. At this time, Adventure had a business relationship with defendant FinanceAmerica [Finance] in which Finance would help finance consumer purchases. Pursuant to this business relationship, Howerton applied for and had approved by Finance a credit application for the balance of \$15,500 due on the Clipper Recreational Vehicle.

Upon Finance's approval of Howerton's credit application, Adventure delivered the vehicle to Howerton; Finance paid \$15,500 to Adventure; and in return, Adventure assigned Howerton's Installment Sales Contract to Finance. Following this transaction, Finance relied on Adventure, based on their prior dealings, to process Howerton's Application for Certificate of Title together with the required Chrysler MSO and supplemental Clipper MSO through the North Carolina Department of Motor Vehicles. Finance also relied on Adventure to record Finance's lien on the Certificate of Title once it was issued. At no time did Finance request to see or request delivery of the Chrysler MSO or supplemental Clipper MSO. Finance made no effort to determine if Adventure possessed either MSO. (Both MSO's were in the possession of Clipper.) Adventure never processed Howerton's applications through the Department of Motor Vehicles, leaving the vehicle untitled as of

American Clipper Corp. v. Howerton

the date this suit was filed. In June 1979, Clipper first learned that the vehicle was gone from Adventure's lot.

Just prior to the filing of Clipper's Complaint for Declaratory Judgment, Clipper, Finance and Howerton entered into a Partial Settlement Agreement. Pursuant to this Agreement, Clipper forwarded to Finance the Chrysler MSO and its own supplemental MSO, to be used by Howerton to secure title to the recreational vehicle. Howerton acknowledged and released all claims he might have with regard to the validity of the assignment of his Installment Contract from Adventure to Finance. Additionally, Howerton, for purposes of this Declaratory Judgment action, agreed to grant Finance sole responsibility for defending against Clipper's complaint. The parties also agreed to be bound by the trial judge's Declaratory Judgment. If Clipper should be adjudged to have superior title to the vehicle, Finance agreed to pay Clipper the original sales price of \$15,076 plus interest. Clipper and Finance agreed not to look to Howerton for payment of any final judgment because Howerton agreed to continue to pay off his Installment Sales Contract held by Finance.

Based on these stipulated facts and the Partial Settlement Agreement entered into by the parties, the trial judge granted Summary Judgment for Clipper in the Declaratory Judgment action. Finance is here appealing from that adverse judgment.

Turner, Enochs, Foster, Sparrow & Burnley, P.A., by Wendell H. Ott, for the plaintiff-appellee.

Richard M. Pearman, Jr. for the defendant-appellant.

BECTON, Judge.

The only issue raised on appeal is whether the trial judge committed error in granting summary judgment for Clipper in this Declaratory Judgment action.

In its complaint for Declaratory Judgment, Clipper incorporates by reference the Partial Settlement Agreement entered into by all the parties which states in pertinent part that:

All parties agree that if Clipper shall obtain a favorable final judgment in the declaratory judgment action referred to above, holding that its right to ownership, title, possession or a security interest with respect to said vehicle is

American Clipper Corp. v. Howerton

superior to that of either Howerton *or* Finance, it will receive and accept from Finance the sum of Fifteen Thousand Seventy-Six Dollars (\$15,076) plus interest at the rate of eight percent (8%) per annum . . . in lieu of reclaiming possession of and/or title to said vehicle. . . . (Emphasis added.)

Appellant, Finance, contends that the Uniform Commercial Code [UCC], G.S. 25-1-101 *et seq.*, as adopted by North Carolina should govern the rights of the parties in this dispute. Relying on the UCC, Finance argues that ownership, title and possession of the Clipper Recreational Vehicle vested in the vehicle purchaser, Howerton, once he took possession, and therefore prevents Clipper from asserting any rights in the vehicle. Since, under the UCC, Clipper could not prevail over the purchaser, Howerton, Finance argues that Clipper cannot prevail over Finance. Finance's reliance on the legal relationship between Clipper and Howerton is misplaced with reference to its own rights and liabilities vis-a-vis Clipper. As stated in their Partial Settlement Agreement incorporated in Clipper's complaint, the trial judge need only have found that Clipper's rights to the vehicle were "superior to that of *either Howerton or Finance*. . . ." Clipper clearly has superior title in the vehicle as between itself and Finance.

G.S. 20-52.1(c) states in pertinent part that:

(c) Upon sale of a new vehicle by a dealer to a consumer-purchaser, the dealer shall execute in the presence of a person authorized to administer oaths an assignment of the manufacturer's certificate of origin for the vehicle, including in such assignment the name and address of the transferee and no title to a new motor vehicle acquired by a dealer under the provisions of subsections (a) and (b) of this section shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.

Any dealer transferring title to, or an interest in, a new vehicle shall deliver the manufacturer's certificate of origin duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the

American Clipper Corp. v. Howerton

manufacturer's certificate of origin to the lienholder and the lienholder shall forthwith forward the manufacturer's certificate of origin together with the transferee's application for certificate of title and necessary fees to the Division.

It is stipulated by the parties that the Chrysler MSO and the Clipper supplemental MSO were at all times in the possession of Clipper. Adventure sold the vehicle without assigning the MSO to Howerton as required under the statute. Finance loaned money and took a security interest in the vehicle without taking possession of the MSO or even inquiring about its whereabouts. In all respects, the transactions involving the vehicle were conducted in violation of G.S. 20-52.1. Under the statute, record title to the new vehicle cannot "pass or vest" until the MSO is properly assigned. Hence, record, paper title remained in the name of Clipper.

Although G.S. 25-2-401 provides that the provisions of the UCC apply to the rights and liabilities of parties to a sales transaction "irrespective of title to the goods," the motor vehicle certificate of title statutes, including G.S. 20-52.1, still have vitality and are not implicitly replaced by the adoption of the UCC. See Anderson, *Uniform Commercial Code*, "Motor Vehicles," §2-401:9 (1971); *Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511 (1970).

Pursuant to G.S. 20-52.1 then, Clipper was record title holder to the recreational vehicle in the possession of Howerton. According to the record, Finance never filed or perfected its security interest in the vehicle. If Finance had taken the steps necessary to file or perfect its security interest, it would have discovered that Adventure did not have record title to the vehicle, nor did Howerton. In allocating the risk of loss between Clipper and Finance, Finance was in the best position to prevent the title confusion which ensued. Finance incurred the risk of loss when it loaned money on collateral without first determining whether its assignor, Adventure, or its debtor, Howerton, had record title to the vehicle. Clipper did the most that it could as a manufacturer; it held onto its MSO and awaited acceptance by Adventure of its offer to sell the vehicle in question. As between Clipper and Finance, then, the trial judge properly found that Clipper held title to the vehicle superior to

Town of Sylva v. Gibson

the rights and title held by Finance. Finance, therefore, should bear the risk of loss accompanying the sale and financing of this vehicle.

It should be noted that this case in no way decides the right to ownership, title and possession of the vehicle as between the manufacturer, Clipper, and the consumer, Howerton. Even if Howerton were found to have superior title to Clipper, under the facts and agreements of this case, Clipper would still have title superior to Finance and would prevail against Finance.

Based on the stipulated facts and Partial Settlement Agreement entered into by the parties, we find that the trial judge acted properly in granting Clipper's motion for summary judgment.

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

TOWN OF SYLVA v. JAMES OLIVER GIBSON AND COUNTY OF JACKSON

No. 8030DC908

(Filed 21 April 1981)

1. Attorneys at Law § 7.5; Rules of Civil Procedure § 60 – delinquent taxes – attorney's fee – authority of another judge to modify

Where the district court entered a judgment of \$215.97 against defendant for delinquent taxes plus costs, including a fee of \$350.00 for plaintiff town's attorney, another district court judge did not have authority under G.S. 1A-1, Rule 60(b) to modify the prior judgment as to the amount of the attorney's fee on the ground that plaintiff was entitled under G.S. 105-374(i) and G.S. 6-21.2 to an attorney's fee of no more than 15% of the amount awarded for delinquent taxes.

2. Attorneys at Law § 7.5; Taxation § 41– tax foreclosure sale – amount of attorney's fee

The amount of an attorney's fee awarded in a tax foreclosure proceeding under G.S. 105-374 is to be determined pursuant to G.S. 105-374(i) in the discretion of the trial court and is not limited by the provisions of G.S. 6-21.2.

Town of Sylva v. Gibson

APPEAL by plaintiff from *Leatherwood, Judge*. Order entered 10 June 1980 in District Court, JACKSON County. Heard in the Court of Appeals 2 April 1981.

Plaintiff brought this action to recover delinquent taxes from defendant Gibson. On 8 April 1980, the Honorable John J. Snow, Jr., judge presiding in the District Court for Jackson County, entered judgment against defendant, including a reasonable attorney's fee for plaintiff. On 30 April 1980, defendant filed a motion for relief from judgment. Following a hearing at the 2 June 1980 session of the District Court for Jackson County, the Honorable Robert Leatherwood, III, judge presiding at the session entered an order modifying a portion of the 8 April 1980 judgment. Plaintiff has appealed from Judge Leatherwood's order.

Holt, Haire & Bridgers, P.A., by R. Phillip Haire, for plaintiff appellant.

Western North Carolina Legal Services, Inc., by William P. Hunter, for defendant appellee.

WELLS, Judge.

[1] The sole question considered in this appeal is whether Judge Leatherwood erred in modifying Judge Snow's prior judgment as to the amount of attorney's fees to be awarded plaintiff.

In his judgment, Judge Snow made findings of fact, entered conclusions of law, and in entering judgment for plaintiff, awarded plaintiff an attorney's fee of \$350.00 as part of the costs of the action. Defendant Gibson did not appeal from Judge Snow's judgment, but instead filed a motion for relief from judgment. The motion was apparently filed after expiration of the time within which notice of appeal may be taken.

The pertinent parts of defendant Gibson's motion and Judge Leatherwood's order in response to that motion are as follows:

THE DEFENDANT, JAMES OLIVER GIBSON, moves the Court, pursuant to Rule 60 of the Rules of Civil Procedure for relief from the Judgment entered April 8, 1980, on the following grounds:

. . . .

Town of Sylva v. Gibson

2). The Court mistakenly ordered the Defendant to pay an attorney fee of Three Hundred Fifty (\$350.00) Dollars as a "reasonable attorney fee", in that:

- a). NCGS §105-374(i) and NCGS §6-21.2 provide that a reasonable attorney fee shall be construed to mean fifteen (15%) percent of the outstanding balance on the debt. To allow more than fifteen (15%) percent as a reasonable attorney fee would deny Defendant due process of law under the Constitution of the United States and the State of North Carolina.

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THIS CAUSE, coming on to be heard, and being heard before the undersigned Judge Presiding at the June 2, 1980 Civil Session of Jackson County District Court upon Defendant, JAMES OLIVER GIBSON'S, Motion for Relief from Judgment and Exceptions to Sale, and upon Plaintiff's Motion for Damages; the Court, having heard the evidence, testimony of witness, and argument of counsel, and having examined the record, documents entered herein, and memoranda of counsel, makes the following:

FINDINGS OF FACT

1). THAT on April 8, 1980, Judgment was entered in this action, ordering that:

- A). The Plaintiff have and recover of the Defendants, in rem, the sum of Two Hundred Fifteen and 97/100 (\$215.97) Dollars, plus costs of this action, including an attorney's fee of Three Hundred Fifty and No/ 100 (\$350.00) Dollars.

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CONCLUSIONS OF LAW

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3). THAT the Defendant, JAMES OLIVER GIBSON, is entitled to relief from the Judgment insofar as said judgment awards costs to the Plaintiff for attorney's fee exceeding fifteen percent (15%) of the amount of taxes due and interest thereon.

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Town of Sylva v. Gibson

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

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4). THAT the Judgment herein be, and hereby is, modified so that Plaintiff have and recover the costs of this action, including an attorney's fee of fifteen percent (15%) of the amount awarded for taxes due and interest; that is, the sum of Twenty-Seven and 81/100 (\$27.81) Dollars.

.

It is clear from the wording of his motion that defendant was asserting an error of law in Judge Snow's judgment as his basis for relief. It is just as clear that Judge Leatherwood's order attempted or purported to modify Judge Snow's order so as to apply a different principle or rule of law to the portion of the prior judgment awarding attorney's fees. This was clearly erroneous. It is settled law that erroneous judgments may be corrected only by appeal, *Young v. Insurance Co.*, 267 N.C. 339, 343, 148 S.E. 2d 226, 229 (1966) and that a motion under G.S. 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review. *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E. 2d 231, 234 (1979); *see also, In re Snipes*, 45 N.C. App. 79, 81, 262 S.E. 2d 292, 294 (1980); 2 McIntosh, N.C. Practice and Procedure § 1720 (Supp. 1970). A judge of the District Court cannot modify a judgment or order of another judge of the District Court, *Waters v. Personnel, Inc.*, 32 N.C. App. 548, 550, 233 S.E. 2d 76, 78 (1977), *rev'd on other grounds*, 294 N.C. 200, 240 S.E. 2d 338 (1978), absent mistake, fraud, newly discovered evidence, satisfaction and release, or a showing based on competent evidence that justice requires it. *Sides v. Reid*, 35 N.C. App. 235, 238, 241 S.E. 2d 110, 112 (1978); *Whitfield v. Wakefield*, 51 N.C. App. 124, 275 S.E. 2d 263 (1981). In the case *sub judice*, defendant does not contend, nor could he show, that the disputed portion of Judge Snow's judgment was void or irregular, or that it was *entered* through mistake or inadvertence, or is otherwise deficient in any way which would compel another judge of the District Court, in the interest of justice, to correct it.

[2] In its appeal, plaintiff has also argued that Judge Leatherwood's conclusions as to the correct statutory provision for

Burrow v. Jones

setting attorney's fees in such cases were erroneous. Although we have held that Judge Leatherwood was without authority to reach that question, we deem it appropriate to note that plaintiff's argument states the correct rule of law: *i.e.*, that the amount of attorney's fees in such cases is to be determined under G.S. 105-374(i) in the discretion of the trial court, not limited by the provisions of G.S. 6-21.2.

Judge Leatherwood's order of 10 June 1980 modifying Judge Snow's judgment of 8 April 1980 as to the award of attorney's fees to plaintiff is vacated. The case is remanded for proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges VAUGHN and CLARK concur.

GARY WESLEY BURROW v. RUTH LITTLE JONES AND CARRIE MAY LITTLE

No. 8019SC798

(Filed 21 April 1981)

Automobiles § 78—motorcycle near center of highway—contributory negligence as matter of law

In an action to recover damages for personal and property damage arising out of a collision between plaintiff's motorcycle and defendants' automobile, the trial court properly directed verdict for defendants where the evidence tended to show that plaintiff was contributorily negligent as a matter of law in that (1) he was traveling in the left hand part of his lane, about 12 to 18 inches from the center line; when he first saw defendants' car it was 175 to 200 feet away, and about a foot over the center line into his lane; and plaintiff "held where he was riding in the left groove of the road" and "waited too late to turn to the right"; and (2) at the time of the accident, G.S. 120-146.1 required persons operating motorcycles to do so as near to the right side of the road as practicable, and plaintiff introduced no evidence from which it could reasonably be inferred that he could not have been riding in the right hand part of his lane in compliance with the statute.

APPEAL by the plaintiff from *Lupton, Judge*. Judgment entered 14 February 1980 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 6 March 1981.

Burrow v. Jones

Plaintiff filed the complaint in this action on 23 July 1979 seeking damages for personal injuries and property damage arising out of a collision between a motorcycle, owned and operated by plaintiff, and an automobile owned by the defendant, Carrie Mae Little, and operated by her daughter, defendant Ruth Little Jones.

The substance of the complaint is that on 28 March 1975 the plaintiff was operating his motorcycle in the southbound lane of U.S. Highway 220 in full compliance with the laws of North Carolina when defendant, Ruth Little Jones, approaching from the opposite direction, swerved negligently and unlawfully across the center line and into plaintiff's lane of traffic, thereby causing a collision of the two vehicles.

Defendants answered, denying any negligence on their part and alleging that defendant Ruth Little Jones was operating her vehicle in a careful and prudent manner on her side of the highway when plaintiff swerved negligently into her lane, thereby causing the two vehicles to collide. Defendants further pleaded plaintiff's contributory negligence as a defense.

Plaintiff's evidence tended to show that U.S. Highway 220 at the scene of the accident is a two-lane hard surface road of normal width. He testified that on the day of the collision he was proceeding southward toward home, riding in the left-hand part of his lane, one foot to a foot and a half from the center line, when he saw defendants' car 175 to 200 feet away from him and one foot over the yellow line into his lane. He further testified that defendants' car stayed in his lane, but he held to where he was riding in the left groove of his lane keeping his eyes on the car, that he waited too late to turn to the right and the left fender, bumper and headlight of the car hit the left part of his motorcycle and his left leg.

Defendants' evidence tended to show that Ruth Little Jones was driving north on U.S. Highway 220 in her lane when plaintiff swerved into her lane and collided with her car. Photographs taken of the road at the scene of the accident were admitted into evidence. Other witnesses testified they observed skid marks leading up to the defendants' car and that these skid marks were totally in the defendants' lane of travel.

Defendants moved for a directed verdict pursuant to G.S.

Burrow v. Jones

1A-1, Rule 50, at the close of plaintiff's evidence, and again at the close of all the evidence, on the ground that plaintiff's evidence failed to show actionable negligence on the defendants' part, and on the further ground that the plaintiff's evidence showed that he was contributorily negligent as a matter of law. Defendants' motion was granted and plaintiff appealed.

Ottway Burton for the plaintiff appellant.

Beck and O'Briant, by Adam W. Beck, for defendant appellees.

ARNOLD, Judge.

Plaintiff contends the court erred in granting defendants' motion for a directed verdict. In considering a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the non-movant, deeming all evidence which tends to support his position to be true, resolving all evidentiary conflicts favorably to him and giving him the benefit of all inferences reasonably to be drawn in his favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978); *Ryder v. Benfield*, 43 N.C. App. 278, 258 S.E. 2d 849 (1979).

The trial court in this case granted a directed verdict on the grounds that: (1) Plaintiff failed to show actionable negligence on the part of defendants and (2) plaintiff had established his own contributory negligence as a matter of law. As to the first ground, we find there was ample evidence from which a jury could find that defendant Ruth Little Jones was negligent in the operation of her vehicle. If, however, the evidence establishes plaintiff's contributory negligence as a matter of law, judgment directing a verdict for defendants would be proper. In this regard defendant argues that plaintiff's negligence is established by his operation of his motorcycle near the center line of the highway, and his failure to turn his vehicle after observing defendants' vehicle, and by his violation of G.S. 20-146.1.

A directed verdict on the ground of contributory negligence may be granted only when the evidence establishes plaintiff's negligence so clearly that no other reasonable inference or conclusion may be legitimately drawn therefrom. *Harrington v. Collins*, 298 N.C. 535, 259 S.E. 2d 275 (1979); *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976); *Fields v. Robert Chappell Associates, Inc.*, 42 N.C. App. 206, 256 S.E. 2d 259 (1979).

Burrow v. Jones

Accepting plaintiff's testimony and other evidence as true, viewing the evidence in the light most favorable to plaintiff, and giving him the benefit of all inferences reasonably to be drawn in his favor, the evidence discloses that plaintiff was travelling in the left-hand part of his lane, about a foot to a foot and a half from the center line; that when he first saw defendants' car it was 175 to 200 feet away, and about a foot over the center line into his lane; and that he "held where he was riding in the left groove of the road" and "waited too late to turn to the right."

The question that must be decided is whether this evidence so clearly establishes negligence on plaintiff's part that no other reasonable inference or conclusion can be drawn therefrom. We think it does. While a reasonable inference is valid on a motion for a directed verdict, speculation is not. *Williamson v. McNeill*, 8 N.C. App. 625, 175 S.E. 2d 294, *aff'd* 277 N.C. 447, 177 S.E. 2d 859 (1970). There is no evidence in the record to support an inference that plaintiff could not have safely turned his motorcycle to the right a foot or two and avoided the collision.

Moreover, this analysis also applies to the defendants' negligence per se argument. At the time of the accident G.S. 120-146.1 provided:

Any persons operating motorcycles upon the public highways shall operate the same as near to the right side of the roadway as practicable, exercising due care when passing a standing vehicle or one proceeding in the same direction.

Absent a specific legislative exception, violation of the provisions of a safety statute is negligence per se. *Poultry Co. v. Thomas*, 289 N.C. 7, 220 S.E. 2d 536 (1975). Plaintiff testified that motorcycle riders, including himself, rode in either the right-hand or the left-hand indentation made by the tires of cars. He introduced no evidence from which it could reasonably be inferred that he could not have been riding in the right-hand part of his lane in compliance with the statute. Plaintiff's contributory negligence, therefore, is established as a matter of law on this ground also.

Affirmed. .

Judges CLARK and MARTIN (Harry C.) concur.

Stephens v. Worley

DENNIS STEPHENS AND DENISE STEPHENS, MINORS, BY AND THROUGH THEIR GUARDIAN AD LITEM, ALICE MARY STEPHENS AND ALICE MARY STEPHENS, INDIVIDUALLY, AND ROBESON COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, *ex rel*, ALICE MARY STEPHENS v. ANTHONY L. WORLEY

No. 8016DC974

(Filed 21 April 1981)

Bastards §§ 8.1, 10—acquittal in criminal bastardy proceeding – no *res judicata* in county's civil action

A judgment of acquittal in a criminal prosecution under G.S. 49-2 for willful failure to support two illegitimate children was not *res judicata* in a county's civil action under G.S. 49-14 to establish defendant's paternity of the two children where the criminal judgment merely stated that defendant was found not guilty, the judgment did not disclose whether an acquittal was entered because the judge found that defendant was not the father of the children or because he did not believe defendant had willfully failed to provide for their reasonable support, and there was thus no showing on the record that the issue of paternity had been previously adjudicated in defendant's favor.

APPEAL by plaintiff, Robeson County, from *Richardson, Judge*. Order entered 13 August 1980 in District Court, ROBESON County. Heard in the Court of Appeals 9 April 1981.

Plaintiff, Robeson County, was a party in a civil action filed against defendant to establish his paternity of two illegitimate children pursuant to G.S. 49-14. Upon defendant's motion, the court dismissed the County's claim on the grounds of *res judicata* due to defendant's previous acquittal in a criminal bastardy proceeding instituted by the State pursuant to G.S. 49-2.

These are the facts. On 7 July 1978, Alice Mary Stephens, at the request of Robeson County, procured a warrant charging defendant with the crime of bastardy with respect to her two minor children. Defendant pleaded not guilty to the charge, and the district court judge entered a general verdict of not guilty on 6 September 1978. This judgment did not contain any findings of fact.

Subsequently, on 21 November 1979, Ms. Stephens, individually and as guardian ad litem of the children, and Robeson County, on behalf of its child support enforcement agency, filed a civil action under G.S. 49-14 to establish defendant's paternity. Specifically, Ms. Stephens sought relief in the form of

Stephens v. Worley

reasonable support and maintenance of the minor children, and the County sought reimbursement for the medical expenses incident to the pregnancy and birth of the children and all past public assistance paid for their support. Defendant pleaded the defense of res judicata in the civil case on the basis of his prior acquittal in the bastardy action.

The court denied defendant's motion to dismiss the claims of Ms. Stephens and her children. The court, however, dismissed Robeson County from the action on the grounds of res judicata. In this respect, the court made the following pertinent conclusions of law:

That plaintiff, Robeson County, being a subdivision of the State of North Carolina and/or acting as Agent of State of North Carolina was in privity with said State in said criminal bastardy proceeding.

That there is an identity of issues in this civil paternity action and said criminal bastardy proceeding.

That plaintiff, Robeson County, being in privity with the State is estopped to continue this action by reason of the doctrine of res judicata because of the defendant being found not guilty in said criminal bastardy action.

Robeson County now appeals from the judgment of dismissal.

Locklear, Brooks and Jacobs, by Dexter Brooks, for plaintiff appellant.

Page and Baker, by Richmond H. Page, for defendant appellee.

VAUGHN, Judge.

The sole issue is whether a judgment of acquittal in a criminal bastardy action, based upon a general verdict which does not include findings of fact, will sustain a bar of res judicata to a subsequent civil action to establish paternity. We conclude that the doctrine of res judicata does not apply to the record in this case and reverse the entry of dismissal against Robeson County.

The doctrine of res judicata bars litigation of a matter in the following situation only:

Stephens v. Worley

when there has been a final judgment or decree, necessarily determining a fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit.

Masters v. Dunstan, 256 N.C. 520, 524, 124 S.E. 2d 574, 576 (1962); *Development Co. v. Arbitration Assoc.*, 48 N.C. App. 548, 269 S.E. 2d 685 (1980). In the context of the instant case, therefore, it is necessary to analyze the nature and elements of the civil and criminal causes of action to determine whether a final judgment previously decided an identical fact or issue against the County.

G.S. 49-14(a) simply provides that "[t]he paternity of a child born out of wedlock may be established by civil action." In contrast, G.S. 49-2 provides, in pertinent part, that "[a]ny parent who willfully neglects or who refuses to provide adequate support and maintain his or her illegitimate child shall be guilty of a misdemeanor. . . ." In a prosecution under G.S. 49-2, the State must, therefore, prove two things: (1) that the defendant is indeed the parent of the child and (2) that defendant has intentionally neglected or refused to provide reasonable support for the child. *State v. Love*, 238 N.C. 283, 77 S.E. 2d 501 (1953). In addition, G.S. 49-7 requires the court to determine, in the affirmative, first whether or not the defendant is the parent *before* it proceeds to determine whether or not defendant has wilfully failed to support his or her child.¹ In sum, the issue of paternity is the entire thrust of the civil action under G.S. 49-14, whereas the focus of the crime punishable by G.S. 49-2 is the wilful failure to pay support for an illegitimate child, not paternity, because the statute does not make the mere begetting of a child a crime. *See Bell v. Martin*, 299 N.C. 715, 722, 264

1. For this reason, the verdict in a bastardy action should ordinarily be rendered in a special form, upon the submission of separate written issues or interrogatories, or alternatively, if a general verdict is returned, it should be accompanied by appropriate findings of fact to clarify the precise effect of the judgment. *See State v. Ellis*, 262 N.C. 446, 137 S.E. 2d 840 (1964); 2 Lee, N.C. Family Law § 177, at 406-07 (4th ed. 1980). *See, e.g., State v. Brown*, 49 N.C. App. 194, 270 S.E. 2d 534 (1980).

Stephens v. Worley

S.E. 2d 101, 106 (1980); *State v. Ellis*, 262 N.C. 446, 137 S.E. 2d 840 (1964).

Viewing the two actions in this light, we believe it is significant that, in the prior criminal proceeding against defendant, the judgment merely stated that defendant was found not guilty of the bastardy charge. Our Supreme Court has concluded that "a verdict of not guilty on the charge of willful nonsupport does no more than find the defendant not guilty of the crime laid in the bill. The verdict could not be construed to be a verdict of not guilty of begetting the child." *State v. Wilson*, 234 N.C. 552, 554, 67 S.E. 2d 748, 749-50 (1951) (Barnhill, J., concurring). See *State v. Robinson*, 236 N.C. 408, 72 S.E. 2d 857 (1952). In addition, the Court has held that a previous acquittal on a charge of wilful nonsupport does not bar a subsequent prosecution because G.S. 49-2 creates a continuing offense. *State v. Ellis*, 262 N.C. 446, 137 S.E. 2d 840 (1964); *State v. Perry*, 241 N.C. 119, 84 S.E. 2d 329 (1954).

Here, there is simply no showing, on this record, that the issue of paternity has, in fact, been previously adjudicated in defendant's favor. The general decree filed in the criminal action does not disclose whether the judge entered an acquittal because, in the first instance, he found that defendant was not the father of the children, or, in the second instance, he did not believe defendant had wilfully failed to provide for their reasonable support. The doctrine of *res judicata* does not, therefore, bar the County's claim in the civil action because the prior criminal judgment did not *necessarily* determine the identical issue of paternity adversely to it. *Masters v. Dunstan, supra*, 256 N.C. 520, 124 S.E. 2d 574 (1962). In sum, the principle of *res judicata* cannot apply to the County in the proceeding under G.S. 49-14 on the basis of the general acquittal on a bastardy charge under G.S. 49-2 when the State would not also be barred from prosecuting defendant for wilful nonsupport again under the present circumstances and state of the record in this case.

In view of the foregoing, we need not consider whether the judge was correct in his conclusions that the County was "in privity with said State in said criminal bastardy proceeding" and that the County was estopped to pursue the present civil action.

The order is reversed.

Lowe v. Peeler

Reversed and remanded.

Judges CLARK and WELLS concur.

J.D. LOWE v. MARLENE G. PEELER

No. 8027SC862

(Filed 21 April 1981)

Uniform Commercial Code § 35— defendant as accommodation party — jury question

In an action to recover the amount of a note admittedly signed by the parties where plaintiff claimed that he was entitled to recover from defendant the full sum of the note plus interest which he was allegedly forced to pay after defendant defaulted on the note, the trial court erred in directing a verdict for plaintiff since the jury could find based upon the evidence that defendant had signed as an accommodation maker, thus preventing defendant from being liable to plaintiff. G.S. 25-3-415(5).

APPEAL by defendant from *Griffin, Judge*. Judgment entered 29 April 1980 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 31 March 1981.

This is a civil action wherein plaintiff seeks to recover \$5,600 with respect to a note admittedly signed by the parties. In a complaint filed 3 May 1979, plaintiff alleged that he and defendant entered into an agreement whereby plaintiff would "sign as surety" with defendant on a certain note, and that after defendant defaulted on the note, plaintiff "was forced to pay . . . the full sum of the note plus interest," such that plaintiff was entitled to recover from defendant the full sum of the note, \$5,600, plus interest, for which demand had been made and refused. Defendant filed answer, denying the material allegations of the complaint, and further averring that the complaint failed to state a claim upon which relief can be granted.

Plaintiff offered evidence at trial tending to show that prior to the death of defendant's father, Van Peeler, plaintiff and Van Peeler were involved in several businesses together, including a restaurant and an organization called Carolina Game Farm. In the course of their business relationship, sometime around

Lowe v. Peeler

27 May 1976, plaintiff and Van Peeler personally executed two short term notes in the amounts of \$3,100 and \$2,500 respectively. A tractor and twenty-four head of cattle belonging to plaintiff were listed as collateral for the notes. The proceeds were issued by checks made payable to both plaintiff and Van Peeler; upon receiving the checks, plaintiff endorsed them over to Van Peeler and never saw the proceeds again. The proceeds were deposited in Carolina Game Farm's bank account.

Van Peeler died on 9 July 1976. When the notes he executed with plaintiff came due in September 1976, plaintiff called defendant and defendant's mother about signing renewal notes. Defendant, who had been a stockholder in Carolina Game Farm since before her father's death, had started handling the bookkeeping for Carolina Game Farm by this time, and her signature on the renewal notes was desired since she "had taken over the business." Defendant and her mother agreed to sign renewal notes, and on 20 September 1976, a renewal note for the \$2,500 debt was executed, and signed by plaintiff and defendant's mother. On 27 September 1976, a renewal note for the \$3,100 debt was executed, and signed by plaintiff and defendant. These notes were made payable to the Independence National Bank of Lawndale. Defendant signed the \$3,100 note "as a principal and not as an endorser."

On 31 December 1976, again at the request of plaintiff, defendant and plaintiff signed a renewal note in the amount of \$5,600 for the notes she and her mother had signed in September 1976. This note was subsequently renewed by another \$5,600 note, signed by plaintiff and defendant at plaintiff's request on 25 May 1977. Defendant was told by a bank officer at that time that she was "jointly liable" with plaintiff for the \$5,600. Plaintiff continued to list the tractor and the cattle as collateral for the renewal notes, including the 25 May 1977 note. Carolina Game Farm declared bankruptcy in 1978, and on 1 August 1978, after the due date on the 25 May 1977 note had been extended several times by the payment of accumulated interest, including a payment by defendant, plaintiff paid off the 25 May 1977 note in full. Plaintiff sought reimbursement of the \$5,600 from defendant, who refused to give it.

Defendant then offered evidence which will be discussed in the opinion to follow. At the close of all the evidence, the court,

Lowe v. Peeler

insofar as the record discloses, *ex mero motu* directed a verdict for plaintiff in the amount of \$2,800. From a judgment that plaintiff have and recover from defendant the sum of \$2,600, defendant appealed.

No counsel for the plaintiff appellee.

Yelton, Farfour & McCartney, by Leslie A. Farfour, Jr., for the defendant appellant.

HEDRICK, Judge.

We note at the outset that neither the record nor the brief submitted by defendant offers us any explanation as to the difference in amount between the announced verdict and the judgment.

We also note that the trial judge in the present case apparently not only directed a verdict *ex mero motu*, but did so in favor of the party with the burden of proof. Without passing upon the propriety of the court's rather unusual action, we proceed to examine the merits of the second assignment of error brought forward by defendant.

Defendant contends by this assignment of error that the court erred in entering a judgment directing a verdict for plaintiff. She argues that the jury should have been allowed to determine whether defendant signed the notes as an accommodation party under G.S. § 25-3-415. We agree.

G.S. § 25-3-415 in pertinent part provides:

(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

. . .

(5) An accommodation party is not liable to the party accommodated, . . .

The Official Comment to G.S. § 25-3-415 in pertinent part provides: "Under subsection (3) except as against a holder in due course without notice of the accommodation, parol evidence is admissible to prove that the party has signed for accommodation."

Lowe v. Peeler

In the present case, defendant admitted the execution of the notes and presented evidence tending to show that at the time her father, Van Peeler, and plaintiff executed the original notes in May 1976, defendant's only involvement with her father's businesses was as a stockholder of Carolina Game Farm, and that she did not begin handling bookkeeping duties for Carolina Game Farm until sometime after her father's death. Her evidence also tended to show that she had no knowledge of the notes executed by her father and plaintiff prior to September 1976 when plaintiff first requested her signature on the renewal notes. Defendant then testified with respect to her signing of the notes as follows:

Mr. Wright [officer of the bank which was payee on the notes] had told me that I needed to sign the note or they would have to execute judgment against the collateral of J.D. Lowe [plaintiff].

. . . .

I signed the note because Mr. Lowe and Mr. Wright told me to. . . .

. . . .

Mike Wright called me and told me I needed to come down and sign the note since my father died and if I didn't come down and sign it, they would be forced to sell Mr. Lowe's collateral.

J.D. Lowe also called me and told me I needed to sign the note because they were going to sell his collateral if I didn't. I went down and signed it. I did not intend to incur any liability financially to J.D. Lowe. . . .

I signed this note in order to prolong it so that I could have a chance to get my father's estate closed and to come to some settlement with Mr. Lowe and Mr. McCraw [business associate of Van Peeler and plaintiff] with regard to the estate.

. . . .

When I first signed the note, I did not realize that I was obligating myself to the bank for that money. I was told that they needed my signature because my father was dead

Lumber Co. v. Grizzard

and they wanted me to come and sign it in his place. Mike Wright and J.D. Lowe told me that.

. . .

I talked with J.D. Lowe prior to signing this note. J.D. Lowe told me that this was the note that he and my father had entered into together and that he had collateral against this note. I signed this note just to give J.D. Lowe more time until the other things involved with the estate were settled.

. . .

I thought I was signing the note just to put my name on it so J.D. Lowe could have more time and have it renewed.

They called me to come down and put my name on the note in place of my father's. I was not the executrix of the estate. . . .

We are of the view that the evidence is sufficient to require submission of the case to the jury on the issue of whether defendant signed the notes as an accommodation maker. Since the jury could find based upon the evidence that defendant had signed as an accommodation maker, thus preventing defendant from being liable to plaintiff, G.S. § 25-3-415(5), the court erred in directing a verdict for plaintiff.

Reversed and remanded.

Judges ARNOLD and WEBB concur.

COULBOURN LUMBER COMPANY v. WILBUR ALONZO GRIZZARD AND
JEAN GRIZZARD, T/A STAR GLASS COMPANY & BERTIE GLASS
COMPANY

No. 806DC795

(Filed 21 April 1981)

Rules of Civil Procedure § 55.1— refusal to set aside entry of default

The trial court did not err in refusing to set aside an entry of default by the clerk of court on the ground of excusable neglect of counsel where the record shows that over seven and one-half months elapsed between the time

Lumber Co. v. Grizzard

defendants filed an untimely and unserved application for extension of time to answer and the date defendants moved to set aside the entry of default and that the case was calendered for trial by such date. Furthermore, defendants were not prejudiced by the court's refusal to set aside the entry of default where they had a trial on the merits of the cause of action stated in plaintiff's complaint.

APPEAL by defendants from *McCoy, Judge*. Judgment entered 24 April 1980 in District Court, BERTIE County. Heard in the Court of Appeals 5 March 1981.

Plaintiff brought this action to recover damages for breach of contract. In its complaint, plaintiff alleged the following circumstances and events. Plaintiff, a building contractor, contracted to build an addition to the residence of Ernest Carraway. As a part of that contract, skylights were to be installed in the roof of the addition. Plaintiff sub-contracted with defendants to install the skylights. Defendants undertook to install the skylights, but did so in a defective manner. The skylights leaked and had to be replaced. Plaintiff made repeated demands upon defendants to correct the defects in their work, but defendants were unwilling or unable to do so and have refused to properly install the skylights. Because of defendants' refusal and failure to correct the defective work, it was necessary for plaintiff to cause other persons to properly install the skylights at an expense to plaintiff of \$2,000.00. Plaintiff has demanded payment of defendants, but defendants have refused payment. Plaintiff prayed that it have and recover of defendants the sum of \$2,000.00, with interest from 4 April 1979 until paid.

The complaint was filed 24 July and served on 26 July 1979. Defendants did not answer or otherwise plead to the complaint until 28 August 1979, when they filed an application for an extension of time to file answer. The record does not show that this application was ever served upon plaintiff. On 5 September 1979, plaintiff applied for and obtained from the clerk an entry of default against defendants, transferring the cause to the civil issue docket for trial on the issue of damages.

On 18 April 1980, defendants filed a motion to set aside the entry of default and for permission to file an answer, on grounds of excusable neglect of counsel. The motion was denied.

At trial, both plaintiff and defendants offered evidence.

Lumber Co. v. Grizzard

From judgment for plaintiff in the amount of \$1,374.00, defendants have appealed.

Pritchett, Cooke & Burch, by W.L. Cooke, for plaintiff appellee.

Moore & Moore, by Milton E. Moore, for defendant appellants.

WELLS, Judge.

Although defendants excepted to and assigned as error that entry of judgment by the trial judge, they have not argued that exception in their brief and it is therefore taken as abandoned. *See* Rule 28(b)(3), Rules of Appellate Procedure. The only question presented for our review is whether the trial judge committed prejudicial error in denying defendants' motion to set aside entry of default by the clerk.

Pursuant to the provisions of G.S. 1A-1, Rule 55(d), the trial court may set aside an entry of default for good cause shown. A motion to set aside an entry of default is addressed to the sound discretion of the trial judge and the order of the trial court ruling on such a motion will not be disturbed on appeal absent a showing of abuse of that discretion. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 108, 264 S.E. 2d 395, 397 (1980); *Privette v. Privette*, 30 N.C. App. 41, 44, 226 S.E. 2d 188, 190 (1976); *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 510-11, 181 S.E. 2d 794, 798 (1971). It appears from the record that a period of over seven and one-half months elapsed from the time defendants' untimely and unserved application for extension of time to file their answer was filed and the date defendants moved to set aside the entry of default, and that by such date, the case was calendared for trial. Under such circumstances, we believe the trial judge did not abuse his discretion in reaching the conclusion that defendants had not shown good cause for setting aside the entry of default.

Additionally, we note that in order for defendants to obtain relief here, they must show that the asserted error by the trial court was material and prejudicial. G.S. 1A-1, Rule 61, Rules of Civil Procedure; *Trust Co. v. Carr*, 10 N.C. App. 610, 618, 179 S.E. 2d 838, 843, *modified*, 279 N.C. 539, 184 S.E. 2d 268 (1971). We find no such prejudice and therefore decline to disturb the action of

State v. Griffin

the court below. The entry of default by the clerk served no further purpose than moving this case for trial to the civil issue docket. The record discloses that at trial plaintiff put on evidence as to the existence of the contract, its breach by defendants, and damages ensuing to plaintiff as a result of the breach. Defendants' evidence did not dispute the existence of the contract, but did dispute its breach and the amount of damages to plaintiff. The trial judge found as fact that the defendants entered into a contract with plaintiff's assignor, and that plaintiff was damaged by the negligent and defective manner in which defendants performed their contractual duties. All of these findings were supported by competent and material evidence. It thus appears that defendants have had a trial on the merits of the cause of action stated in plaintiff's complaint. Under such circumstances, we fail to see any prejudice to defendants from the trial court's failure to set aside the entry of default by the clerk.

Defendants argue that the decision of this Court in *Roland v. Motor Lines*, 32 N.C. App. 288, 231 S.E. 2d 685 (1977) compels us to give them another day in court. *Roland* is clearly distinguishable, for in that case a default judgment was entered by the clerk, and defendants had no opportunity to defend on the merits.

Affirmed.

Judges VAUGHN and BECTON concur.

STATE OF NORTH CAROLINA v. CHESLEY L. GRIFFIN, JR.

No. 8021SC1135

(Filed 21 April 1981)

Criminal Law § 26.5—double jeopardy—guilty plea to failure to yield right-of-way—trial for death by vehicle by failure to yield right-of-way

Where defendant entered a plea of guilty to a charge of failing to yield the right-of-way in violation of G.S. 20-158 which arose out of an automobile accident and a passenger thereafter died from injuries received in the accident, the trial of defendant on a charge of death by vehicle "in that he did unlawfully and willfully fail to yield the right-of-way ... in violation of

State v. Griffin

General Statute 20-158" would place defendant in jeopardy for a second time on the charge of failure to yield the right-of-way in violation of the Fifth Amendment to the U.S. Constitution.

APPEAL by the State from *Collier, Judge*. Judgment entered 5 November 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 2 April 1981.

Defendant was involved in an accident on 10 April 1980 in which an automobile he was operating collided with an automobile driven by Anita Rimel. On the day of the accident, the defendant entered a plea of guilty to failing to yield the right-of-way in violation of G.S. 20-158. Several days later Ms. Rimel's daughter died from injuries received in the accident. On 17 April 1980, defendant was charged with death by vehicle in violation of G.S. 20-141.4 "in that he did unlawfully and willfully fail to yield the right-of-way . . . in violation of General Statute 20-158." It was stipulated that as to the charge of death by vehicle the "State relied upon the same conduct of the defendant of unlawfully and wilfully failing to yield the right of way that the defendant had been previously charged with and that said defendant had pled guilty to." It was further stipulated that the "State had no other evidence of a violation of any other State law applying to the operation and use of a motor vehicle."

The charge of death by vehicle was dismissed by District Court Judge William H. Freeman. The State appealed to the superior court where Judge Collier allowed the defendant's motion to dismiss. The State appealed.

Attorney General Edmisten, by Assistant Attorney General J. Chris Prather, for the State.

Morrow and Reavis, by John F. Morrow, for defendant appellee.

WEBB, Judge.

The Fifth Amendment to the Constitution of the United States provides in part:

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

The United States Supreme Court has held that if a person has pled guilty to a crime and is later charged with another crime,

State v. Griffin

the proof of which would prove all the elements of the crime to which he has previously pled guilty, he has then been tried twice for the first crime. This is proscribed by the double jeopardy clause of the Fifth Amendment. *See Illinois v. Vitale*, ____ U.S. ____, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980). According to the stipulation made a part of the record in this case, the State relies on the charge of failing to yield the right-of-way to support the charge of death by vehicle. If the defendant was tried for death by vehicle, he would be put in jeopardy for a second time for the charge of failing to yield the right-of-way. The judgment of the superior court is affirmed.

The State contends we are governed by *State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638 (1968). In that case, the defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death. After the plea was entered the victim died. The defendant was then convicted of second degree murder. Our Supreme Court rejected the defendant's double jeopardy plea. It held that when the State proved the elements of second degree murder, it did not have to prove all the elements of assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death. An intent to kill and a serious bodily injury not resulting in death were elements of the felonious assault charge to which the defendant pled guilty but were not elements of second degree murder. This is the distinguishing feature between *Meadows* and the case sub judice.

The State also argues that at the time the defendant pled guilty to failure to yield the right-of-way, the crime of death by vehicle was not complete. Whether a new element arises after the defendant had pled guilty to the lesser charge is not the test of *Vitale*. The test is whether the defendant will be placed in jeopardy twice for the same offense.

Affirmed.

Judges HEDRICK and ARNOLD concur.

State v. Robinson

STATE OF NORTH CAROLINA v. EARLY LEE ROBINSON

No. 8020SC1081

(Filed 21 April 1981)

Larceny § 8- larceny of firearm – instructions proper

Larceny of a firearm is a felony regardless of the value of the weapon stolen and without regard to whether the larceny was accomplished by means of a felonious breaking or entering; therefore, the trial court's instructions requiring the jury to find that defendant had stolen the rifle and other property in order to find defendant guilty of felonious larceny was proper and the evidence was sufficient to support the jury's verdict of guilty of felonious larceny. G.S. 14-72(b)(4).

APPEAL by defendant from *Seay, Judge*. Judgment entered 18 June 1980 in Superior Court, MOORE County. Heard in the Court of Appeals 30 March 1981.

Defendant was indicted for felonious breaking or entering and felonious larceny of several rifles and other property by means of breaking or entering. The jury returned a verdict of not guilty on the breaking or entering charge and guilty of felonious larceny. A prison sentence of not less than three years nor more than five years was entered.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Thigpen and Evans, by Frank C. Thigpen, for defendant.

MARTIN (Harry C.), Judge.

On the larceny charge, the court gave the following instructions to the jury:

[T]he State of North Carolina must prove six things and do so beyond a reasonable doubt.

First, that the defendant took the rifle or the rifles and golf clubs, golf bag and vacuum cleaner belonging to Roy Collins.

.

... I charge that if you find from the evidence beyond a reasonable doubt that on or about November the 7th, 1979, Early Robinson took and carried away Roy Collins' rifles

State v. Robinson

and golf clubs and golf bags and vacuum cleaner, and that he did so without Roy Collins' consent, knowing that he was not entitled to take this property, and intending at the time to deprive Mr. Collins of the use of the property permanently, and that these items of property were taken from a building following — or a structure and a residence, following a breaking or entering, it would be your duty to return a verdict of guilty of felonious larceny.

Ordinarily, if a defendant is found not guilty of breaking or entering and the felonious larceny charge is based upon its having been accomplished by means of a felonious breaking or entering pursuant to N.C.G.S. 14-72(b)(2), it is necessary for the judge to submit to the jury the question of the value of the stolen property in order for the jury to return a verdict of guilty of felonious larceny. *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969); *State v. Teel*, 20 N.C. App. 398, 201 S.E. 2d 733 (1974).

Such is not the case, however, where the defendant is charged in the bill of indictment with larceny of a firearm. Larceny of a firearm is a felony regardless of the value of the weapon stolen and without regard to whether the larceny was accomplished by means of a felonious breaking or entering. N.C. Gen. Stat. 14-72(b)(4). Here, the bill charged defendant with larceny of "a quantity of rifles," and the evidence disclosed that a rifle was stolen from the home of the witness Collins and pawned by defendant. The rifle was introduced into evidence. In its final mandate on the larceny charge, the court required the jury to find that defendant had stolen the rifle *and* the other property in order to find defendant guilty of felonious larceny. By its verdict, the jury so found. Under the facts of this case, we hold the court properly sentenced defendant on the verdict of guilty of felonious larceny.

We have reviewed defendant's assignments of error and find them to be without merit.

No error.

Chief Judge MORRIS and Judge HILL concur.

Looper v. Looper

GLEN W. LOOPER v. EVELYN LOOPER

No. 8025DC887

(Filed 21 April 1981)

Appeal and Error § 6.2— entry of default – no right of appeal

The entry of default by the clerk is not a final judgment and is not appealable.

APPEAL by plaintiff from *Crotty, Judge*. Order entered 26 January 1980 in District Court, CALDWELL County. Heard in the Court of Appeals 1 April 1981.

Beal and Beal, by Beverly T. Beal, for plaintiff appellant.

Wilson, Palmer & Cannon, by Bruce L. Cannon, for defendant appellee.

MARTIN (Harry C.), Judge.

On 9 October 1975 plaintiff commenced this action for absolute divorce upon grounds of separation. The record indicates that defendant was served with complaint and summons on 20 October 1975 by registered mail. Defendant answered, denying the allegations of separation, alleging abandonment and adultery by plaintiff, and counterclaiming for alimony, alimony pendente lite, and counsel fees. Defendant also counterclaimed concerning certain real property owned by plaintiff. The answer was filed 21 November 1975 and served upon plaintiff's counsel by mail.

Thereafter plaintiff moved to dismiss the answer and counterclaim as being untimely filed, and this motion was denied 26 November 1975. Plaintiff then secured an extension of time to 22 January 1976 within which to reply to the counterclaim. On 26 January 1976, defendant served plaintiff's counsel with motion for entry of default on her counterclaim. On the same date, the clerk of superior court ordered entry of default against plaintiff on defendant's counterclaim.

On 13 April 1976, plaintiff (now represented by different counsel) moved to set aside the entry of default, supporting the motion with affidavits. On 24 August 1976, counsel agreed to continue the case. The case next surfaces 30 January 1978, with the filing by plaintiff of another motion to continue. A notice of

Looper v. Looper

hearing of plaintiff's motion to vacate the entry of default was filed 15 March 1978. We next find plaintiff's second counsel of record being allowed to withdraw on 21 March 1979.

Finally, on 4 December 1979, the motion is brought on for hearing, plaintiff being represented by his present counsel of record. In an order dated 26 January 1980, the trial court denied plaintiff's motion after an extensive hearing requiring two days of court. From this order, plaintiff gave notice of appeal on 31 January 1980. The record on appeal was filed 15 September 1980. Plaintiff's petition for writ of certiorari was denied 28 October 1980.

Plaintiff has no right of appeal from the denial of a motion to set aside entry of default. The entry of default by the clerk is not a final judgment and it is not appealable. *Trust Co. v. Construction Co.*, 24 N.C. App. 131, 210 S.E. 2d 97 (1974). It is an interlocutory act looking toward the subsequent entry of a final judgment by default. *Crotts v. Pawn Shop*, 16 N.C. App. 392, 192 S.E. 2d 55, *cert. denied*, 282 N.C. 425 (1972). The appeal from the order denying plaintiff's motion to set aside the entry of default is premature. An exception to such an interlocutory order, properly preserved, may be reviewed on an appeal from the final judgment. *Trust Co. v. Construction Co.*, *supra*.

We note this case has pursued a rather leisurely path through the court in Caldwell County, having been pending for five and one-half years without a decision on the merits of the case. Surely the proper and due administration of justice demands more prompt disposition of cases.

Appeal dismissed.

Chief Judge MORRIS and Judge HILL concur.

Jones v. City of Greensboro

R.W. JONES v. THE CITY OF GREENSBORO, PAUL B. CALHOUN, THE GREENSBORO POLICE DEPARTMENT, S.H. "SAM" BRIGGS, L.W. WRENN, R.E. APPLE, AND THE GREENSBORO COLISEUM COMPLEX

No. 8018SC728

(Filed 5 May 1981)

1. Limitation of Actions § 4.1— action to recover for torts — one-year statute of limitations applicable

Plaintiff's claims for false arrest, false imprisonment, assault, and libel were all barred by the one-year statute of limitations, G.S. 1-54, since these claims against defendant were commenced on 3 April 1975, and the incidents giving rise to these alleged claims occurred on 10 February 1974, more than one year earlier; moreover, there was no merit to plaintiff's argument that the appropriate statute of limitations was the two-year statute, G.S. 1-53, since that statute does not apply to tort actions, nor was G.S. 1-539.15, which does provide for a two-year statute of limitations on claims against municipalities, applicable, since that statute did not become effective until after the incidents giving rise to plaintiff's action occurred and after plaintiff's action had been commenced.

2. Conspiracy § 2— conspiracy to commit torts — summary judgment proper

Plaintiff could not use the same alleged acts to form both the basis of a claim for conspiracy to commit certain torts and the basis of claims for those torts; therefore, since the trial court allowed plaintiff to maintain her other claims, except those barred by the statute of limitations or by absolute privilege, the trial court properly entered summary judgment for defendants on plaintiff's claim for conspiracy.

3. Libel and Slander § 11— libel alleged in warrant — absolute privilege

An absolute privilege attached to the warrant charging plaintiff with refusing to obey an order of a police officer to move her vehicle so that plaintiff's alleged claim for libel because of the warrant was barred by such privilege, since a "judicial proceeding" encompassed the warrant from the time of its issuance through plaintiff's trial which ended in nonsuit.

4. Malicious Prosecution § 1— elements of cause of action

In order to recover in an action for malicious prosecution, the plaintiff must establish that defendant instituted or caused to be instituted against him a criminal proceeding with malice and without probable cause, and that such proceeding has been terminated in the plaintiff's favor; moreover, an action for malicious prosecution must be based upon valid process, and if a warrant does not accurately and clearly allege all the constituent elements of an offense, the warrant is invalid and cannot be used as the basis for a malicious prosecution action.

5. Process § 18— abuse of process

To recover in an action for abuse of process, the plaintiff must establish the existence of an ulterior purpose on the part of defendant, and an act in the use of the process which is not proper in the regular prosecution of the proceeding.

Jones v. City of Greensboro

6. Malicious Prosecution § 13.1— invalid warrant – insufficiency of evidence of malicious prosecution

Evidence presented by plaintiff was insufficient to require submission to the jury of the claim for malicious prosecution where the first warrant issued against plaintiff did not accurately and clearly allege all the constituent elements of an offense, was therefore invalid, and could not support an action for malicious prosecution.

7. Process § 19— abuse of process – insufficiency of evidence

Evidence presented by plaintiff was insufficient to require submission to the jury of the claim for abuse of process where plaintiff presented no evidence upon which an inference could be drawn as to either ulterior purpose on the part of defendant police officer or the City of Greensboro or any improper act by them in the use of either of two warrants in the course of plaintiff's prosecution.

8. Trial § 32.1— directed verdict – jury instruction

There was no merit to plaintiff's contention that the trial court erred in instructing the jury at the close of plaintiff's evidence that it had allowed certain of defendants' motions for a directed verdict.

9. Trial § 9.1— court's questioning of witnesses – no error

In an action to recover damages arising out of plaintiff's alleged refusal to move her car when instructed to do so by defendant police officers, plaintiff was not prejudiced where the trial court directed questions to two of the defendants concerning the flow of traffic in the parking lot in question and concerning whether defendants had told plaintiff to move her car, since the questions asked by the court were for the purpose of clarifying the testimony of the witnesses, and the testimony elicited in response was relevant to the matters in issue.

10. Malicious Prosecution § 13.3— malice – sufficiency of evidence

In an action for malicious prosecution arising from plaintiff's arrest for her alleged refusal to follow orders by defendant police officers to move her car, evidence was sufficient to raise questions for the jury to determine regarding the existence of malice, either actual or imputed, and the existence of the other essential elements of malicious prosecution, and the trial court properly refused to direct verdict for plaintiff where the evidence tended to show that one defendant was the only officer present at the court hearing on the criminal charges arising out of the incident; at the 3 April 1974 hearing, the first warrant was quashed "for some technicality," and the district attorney instructed the officer on how the warrant should have been drawn; the officer then went to the magistrate's office and had the second warrant drawn in accordance with the instructions; the officer brought it back to the courtroom and served it upon plaintiff; and the officer testified at the 26 June 1974 trial on the second warrant, after which the trial judge dismissed the case.

11. Municipal Corporations § 9.1— police employed in part-time job – misrepresentation of authority

The trial court erred in dismissing plaintiff's claim for relief for failure to state a claim upon which relief could be granted where plaintiff alleged

Jones v. City of Greensboro

that police officers were permitted to wear the uniform of the city police department while engaged in part-time jobs with various businesses within the city and they thereby misrepresented to the public a continuation of the authority vested in an on-duty police officer to an off-duty police officer, that defendants city and chief of police should be restrained from authorizing or permitting employees to wear the uniform of the police department while engaged in such part-time jobs, and that as a result of the misrepresentation and the misuse of police powers on private property plaintiff had suffered actual damages; and plaintiff's allegations were therefore sufficient to state a claim for relief under 42 U.S.C. § 1983 against defendant police officers, police chief, and city.

APPEAL by plaintiff from *Long, Judge*. Judgment entered 12 March 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 February 1981.

This is a civil action wherein plaintiff seeks to recover damages from defendants arising out of an incident occurring at the Greensboro Coliseum in Greensboro, North Carolina on 10 February 1974. In her verified complaint filed 3 April 1975, plaintiff made allegations which, except where quoted, are summarized as follows:

On 10 February 1974, at approximately 1:30 p.m., defendants R.E. Apple and S.H. Briggs, both citizens and residents of Guilford County who were employed as police officers of defendant Greensboro Police Department during their working hours, were engaged in the business of defendant City of Greensboro and its wholly owned subsidiary, defendant Greensboro Coliseum Complex, as its "agents, servants, and employees . . . acting within the course and scope of such agency, servanthship, or employment" as "parking lot attendants" at the Greensboro Coliseum during their off-duty hours. Plaintiff, her husband, and their seven-year-old son were proceeding to the Coliseum building at that time to attend a circus performance when they were "accosted" by defendants Apple and Briggs. Plaintiff was asked to move an automobile which was parked in "an unrestricted parking area" of the Coliseum parking lot, but she refused, and defendants Apple and Briggs then advised her that if she did not move the car, the car would be towed away. None of the defendants had seen plaintiff operating the vehicle. Plaintiff did not move the car and proceeded toward the Coliseum building with her family. Defendants Apple and Briggs then "conspired" to "bodily seize, . . . bodily assault, . . . falsely arrest, . . . libel, . . . falsely imprison, . . .

Jones v. City of Greensboro

maliciously prosecute, and . . . abuse process to the detriment" of plaintiff, and then defendants Apple and Briggs "bodily seized and assaulted" plaintiff by "dragging her along, at a speed so much faster than she normally walks that her feet barely touched the ground" to a "City of Greensboro Police car" parked on the Coliseum grounds. Plaintiff was placed in the police car, "where she was imprisoned for an extended period" while another police car was summoned, and then defendants Apple and Briggs had plaintiff taken to defendant Greensboro Police Department. Upon plaintiff's arrival there, defendant L.W. Wrenn, a citizen and resident of Guilford County who was employed as a police officer of defendant Greensboro Police Department, and who was engaged in the business of defendants City of Greensboro and Paul B. Calhoun, Chief of Police of the Greensboro Police Department, as "an agent, servant and employee" of said defendants and was acting "within the course and scope of such agency, servanthship, and employment," "conspired" with defendants Apple and Briggs to issue a warrant against plaintiff in furtherance of their "conspiracy" as previously described. This warrant, "alleging purported acts to which defendant Wrenn had no knowledge," stated in pertinent part that "on or about the 10th day of February, 1974," plaintiff "did unlawfully, wilfully, Fail [sic] and refuse to move her vehicle she was operating, after having been ordered to do so, by R.E. Apple and S.H. Briggs of the Greensboro Police Department, . . ." Defendant Wrenn "falsely and wilfully" signed the warrant and "arrested plaintiff without a warrant and without probable cause."

Plaintiff further alleged that at the trial of the case, the warrant signed by defendant Wrenn was quashed, and that defendants "then conspired to continue the campaign of false arrest, libel, false imprisonment, to abuse process, and to further the process of malicious prosecution against the plaintiff" by causing a new warrant to be issued upon the statement of defendant Briggs. This second warrant in pertinent part stated that plaintiff

did unlawfully, wilfully, fail and refuse to comply with a lawful order of R.E. Apple and S.H. Briggs, both of whom are law enforcement officers of the Greensboro Police Department, in that she refused to move the vehicle she was operating after having been ordered to do so by the above

Jones v. City of Greensboro

officers. The order related to the control of traffic and the above officers are invested by law with authority to direct control or regulate traffic, . . .

Defendant Briggs then "used his position as an employee with the Greensboro Police Department . . . to enlist the aid" of defendants Apple, Wrenn, City of Greensboro, Greensboro Police Department, and Chief of Police Calhoun to "falsely arrest [plaintiff], maliciously and falsely imprison [plaintiff], and maliciously and falsely have the warrants issued" against plaintiff, and "to continue the malicious and false prosecution of [plaintiff] after the first warrant was quashed." These defendants "conspired together to further unlawfully assault, arrest, libel, imprison, and maliciously prosecute the plaintiff." When the second warrant was tried, plaintiff pleaded not guilty, and the case was "non-suited" by the trial judge.

Plaintiff also alleged that she was lawfully on the premises of the Greensboro Coliseum Complex as a "paid invitee," and that she has done all required of her under the Charter of defendant City of Greensboro to provide notice to the city of her claim. In addition, plaintiff alleged that defendants Apple and Briggs were not engaged in the business of defendant Greensboro Police Department at the time of the 10 February 1974 incident, and that if they were, they were not vested with the authority to order the movement of a vehicle by plaintiff. Plaintiff averred that as a result of defendants' actions, she has "suffered damages including the expenses of counsel, anxiety, and mental anguish, loss of time from her place of employment, embarrassment, humiliation, mortification, and damage to plaintiff's reputation and standing in the community."

Based on the foregoing allegations, plaintiff undertook to allege the following eleven claims for relief:

As a proximate result of the false arrest of the plaintiff by defendants, plaintiff has suffered actual damages in the amount of \$100,000. Defendants should be compelled to pay \$100,000 as punitive damages for this false arrest.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS A SECOND CAUSE OF ACTION, ALLEGES:

. . .

Jones v. City of Greensboro

As a proximate result of the false imprisonment of the plaintiff by defendants, plaintiff has suffered actual damages in the amount of \$100,000. Defendants should be compelled to pay \$100,000 as punitive damages for this false imprisonment.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS A THIRD CAUSE OF ACTION, ALLEGES:

. . .

As a proximate result of the malicious prosecution of the plaintiff through quashing of the first warrant by the defendants, plaintiff has suffered actual damages in the amount of \$100,000. Defendants should be compelled to pay \$100,000 as punitive damages for this malicious prosecution.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS A FOURTH CAUSE OF ACTION, ALLEGES:

. . .

As a proximate result of the continued malicious prosecution of plaintiff by defendants after the original warrant had been quashed, plaintiff has suffered actual damages in the amount of \$100,000. Defendants should be compelled to pay \$100,000 as punitive damages for this continued malicious prosecution.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS A FIFTH CAUSE OF ACTION, ALLEGES:

. . .

As a proximate result of the conspiracy of the defendants against plaintiff, plaintiff has suffered actual damages in the amount of \$100,000. Defendants should be compelled to pay \$100,000 as actual damages for this conspiracy against plaintiff.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS A SIXTH CAUSE OF ACTION, ALLEGES:

. . .

As a result of the assault by defendants on plaintiff as herein alleged, plaintiff has suffered \$100,000 actual dam-

Jones v. City of Greensboro

ages. Defendants should be compelled to pay \$100,000 as actual damages for this assault on plaintiff.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS A SEVENTH CAUSE OF ACTION, ALLEGES:

. . .

As a result of the libel of the first warrant issued against plaintiff by defendants, plaintiff has suffered \$100,000 actual damages. Defendants should be compelled to pay \$100,000 as actual damages for this libel of the first warrant.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS AN EIGHTH CAUSE OF ACTION, ALLEGES:

. . .

As a result of the libel of the second warrant issued against plaintiff by defendants, plaintiff has suffered \$100,000 actual damages. Defendants should be compelled to pay \$100,000 as actual damages for this libel of the second warrant.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS A NINTH CAUSE OF ACTION, ALLEGES:

. . .

Plaintiff is informed and believes and, therefore, alleges that defendants City of Greensboro and Paul B. Calhoun, as Chief of the Greensboro Police Department, knowingly and willingly encouraged or permitted persons employed by the Greensboro Police Department to wear the uniform of the Greensboro Police Department while engaged in part-time jobs with various businesses within the City of Greensboro, specifically the Greensboro Coliseum Complex, a wholly owned subsidiary of the City of Greensboro, and to misrepresent to the public a continuation of the authority vested in an on-duty police officer to extend to an off-duty police officer.

Defendants City of Greensboro and Paul B. Calhoun, as Chief of the Greensboro Police Department, should be permanently restrained and enjoined from authorizing or permitting employees of the Greensboro Police Department

Jones v. City of Greensboro

from wearing the uniform of the Greensboro Police Department while employed in part-time jobs and through misrepresenting to the public a continuation of their special police powers when they are, in fact, not entitled to an aura of special authority in other jobs.

As a result of the misrepresentation, and the misuse of police powers on private property, plaintiff has suffered actual damages in the amount of \$100,000. Defendants should be compelled to pay \$100,000 as actual damages for this misrepresentation and misuse of police powers on private property.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS A TENTH CAUSE OF ACTION, ALLEGES:

. . .

As a result of the abuse of process by defendants the first time through the quashing of the first warrant, plaintiff has suffered \$100,000 actual damages. Defendants should be compelled to pay \$100,000 as actual damages for this first abuse of process.

PLAINTIFF, COMPLAINING OF THE DEFENDANTS AS AN ELEVENTH CAUSE OF ACTION, ALLEGES:

. . .

As a result of the abuse of process by defendants the second time following the quashing of the first warrant, plaintiff has suffered \$100,000 actual damages. Defendants should be compelled to pay \$100,000 as actual damages for this second abuse of process.

. . .

Defendants City of Greensboro, Paul B. Calhoun, S.H. Briggs, L.W. Wrenn, and R.E. Apple answered 3 June 1975, admitting that the Greensboro Coliseum Complex is wholly owned and operated by the City of Greensboro, and that at all times alleged in the complaint Briggs, Apple, and Wrenn were employed by the City of Greensboro to provide security and direct traffic at the Greensboro Coliseum Complex and were acting within the scope of that employment. These defendants

Jones v. City of Greensboro

also admitted the presence of plaintiff in the parking lot of the Coliseum on the date in question, plaintiff's arrest and escort to the Greensboro Police Department, the existence of the two warrants, and the result of the two trials, but denied the other material allegations of the complaint and further alleged that (1) defendants Greensboro Police Department and Greensboro Coliseum Complex are component parts of defendant City of Greensboro and as such lack the capacity to be sued; (2) if the acts alleged in the complaint did occur, they occurred in the exercise of a governmental as opposed to a proprietary function of defendant City of Greensboro and thus the City is clothed with immunity as to such acts; (3) any arrest or detainment of plaintiff was lawful; (4) plaintiff failed to present her alleged claim to the City Council of defendant City of Greensboro as required by the provisions of the city charter; and (5) the complaint fails to state a claim upon which relief can be granted. In an amendment to their answer, filed 17 February 1977, defendants alleged that any right of action based upon plaintiff's first, second, fifth, sixth, seventh, ninth, and tenth claims for relief were barred by the one-year statute of limitation, G.S. §§ 1-54(1) and (3), and that in regard to the claims for libel, any words alleged to have been published were absolutely privileged, or in the alternative, qualifiedly privileged.

On 8 April 1977, plaintiff filed interrogatories addressed to defendants Apple, Briggs, Wrenn, City of Greensboro, Calhoun, and Greensboro Coliseum Complex. After obtaining an extension of time in which to answer the interrogatories on 9 May 1977, defendants made a motion to dismiss and for judgment on the pleadings, and, in the alternative, for summary judgment with respect to claims for relief nos. 1, 2, 5, 6, 7, 8, 9, 10, and 11 on 6 June 1977. In support of this motion, defendants offered plaintiff's complaint and defendants' answer as amended. Defendants also moved for a protective order on 6 June 1977, seeking to postpone the date upon which defendants would be required to answer plaintiff's interrogatories until after the hearing on defendants' motion to dismiss and for judgment on the pleadings and in the alternative for summary judgment. Defendants contended that if that motion was granted in whole or in part, it would render many of the interrogatories irrelevant to the litigation.

Plaintiff moved to amend her complaint on 30 June 1977 in

Jones v. City of Greensboro

order to strike several claims for relief and to expand upon the allegations of conspiracy. Defendants responded in opposition to the motion on 14 July 1977, claiming that the purpose of the amendment was to evade the statute of limitations defense raised in defendants' answer.

On 24 March 1978, the court in separate orders allowed defendants' motion for a protective order, denied plaintiff's motion to amend her complaint, and entered summary judgment for all defendants on claims for relief nos. 1, 2, 5, 6, 7, 8, and 9 while denying summary judgment on claims for relief nos. 10 and 11. Thereafter, on 25 April 1978, defendants Apple, Briggs, Wrenn, City of Greensboro, Calhoun, and Greensboro Coliseum Complex filed answers to plaintiff's interrogatories, which, among other things, indicated the following: Defendant Apple did advise plaintiff that she would be arrested if the vehicle was not moved; defendants Apple and Briggs, in accordance with customary practice, were wearing their police uniforms while working in the Coliseum parking lot on 10 February 1974; and defendant Wrenn was acting upon information given him by Apple and Briggs when he signed and issued the first warrant.

Defendants Calhoun, Greensboro Police Department, and Greensboro Coliseum Complex moved for summary judgment on the remaining claims against them on 1 November 1979, on the grounds that Calhoun took no part in any acts alleged by plaintiff and that the Greensboro Police Department and the Greensboro Coliseum Complex lacked the capacity to be sued, since they were component parts of the City of Greensboro. The court granted this motion on 6 March 1980. Prior to the "convening of the jury for trial," plaintiff made a second motion to amend her complaint which was also denied.

The case proceeded to trial on plaintiff's third, fourth, tenth, and eleventh claims for relief as to defendants Apple, Briggs, Wrenn, and City of Greensboro. At the close of plaintiff's evidence, the following occurred: Defendants Apple, Briggs, Wrenn, and City of Greensboro moved for a directed verdict in their favor on plaintiff's third, tenth, and eleventh claims for relief, which the court allowed; defendant Wrenn moved for a directed verdict in his favor with respect to plaintiff's fourth claim, which was allowed; and defendants Apple, Briggs, and City of Greensboro moved for a directed verdict in their favor on

Jones v. City of Greensboro

plaintiff's fourth claim, which the court denied. Defendants Apple, Briggs, and City of Greensboro then presented evidence with respect to the fourth claim, the only claim remaining in the case. Thereafter, plaintiff offered rebuttal evidence tending to corroborate her earlier testimony as to the events of 10 February 1974. Defendants Apple, Briggs, and City of Greensboro renewed their motion for a directed verdict on plaintiff's fourth claim for relief, and plaintiff moved for a directed verdict, or in the alternative for peremptory instructions on the elements of malicious prosecution and that the case be submitted to the jury on the issue of punitive damages. The court denied both motions. Defendants then offered rebuttal evidence. At the close of all the evidence, the parties renewed their previous motions, and the court again denied them.

Upon stipulation that defendants Apple and Briggs were acting within the scope of their employment with defendant City of Greensboro, the following issues were submitted to the jury and answered as indicated:

1. Did the defendant, S.H. Briggs, maliciously prosecute the plaintiff, Rosa W. Jones, by a warrant issued on April 3, 1974?

ANSWER: No.

2. Did the defendant, R.E. Apple, maliciously prosecute the plaintiff, Rosa W. Jones, by a warrant issued on April 3, 1974?

ANSWER: No.

3. What amount of actual damages, if any, is the plaintiff entitled to recover of the defendants?

ANSWER: \$

4. What amount of punitive damages, if any, is the plaintiff entitled to recover:

(a) From the defendant Briggs? \$

(b) From the defendant Apple? \$

From judgments for all defendants on all claims, as set out above, plaintiff appealed.

Max D. Ballinger, for the plaintiff appellant.

Jones v. City of Greensboro

Nichols, Caffrey, Hill, Evans & Murrelle, by Joseph R. Beaty, for the defendant appellees.

HEDRICK, Judge.

Plaintiff first assigns error to the order allowing defendants' motion for summary judgment with respect to plaintiff's claims for relief nos. 1, 2, 5, 6, 7, 8, and 9.

[1] G.S. § 1-54, the one-year statute of limitations, in pertinent part provides:

Within one year an action or proceeding —

(3) For libel, slander, assault, battery, or false imprisonment.

The record before us demonstrates, as did the record before the trial court at the time of the hearing on defendants' motion to dismiss and for judgment on the pleadings and, in the alternative, for summary judgment, that plaintiff's alleged claims for false arrest (first claim for relief), false imprisonment (second claim for relief), assault (sixth claim for relief), and libel of the first warrant (seventh claim for relief) were all barred by the one-year statute of limitations, G.S. § 1-54, since these alleged claims against defendants were commenced on 3 April 1975, and the incidents giving rise to these alleged claims occurred on 10 February 1974, more than one year earlier.

Plaintiff contends, however, that a longer statute of limitations controls in the present case, apparently with respect to defendant City of Greensboro. Plaintiff argues that the appropriate statute of limitations is the two-year statute, G.S. § 1-53, which provides that "[a]ll claims against counties, cities and towns of this State" must be brought within two years after the "maturity of such claims." Yet, plaintiff concedes that her position is contrary to past decisions in this State, most notably *Dennis v. City of Albemarle*, 242 N.C. 263, 87 S.E. 2d 561 (1955), which hold that G.S. § 1-53 does not apply to tort actions. In support of her argument, plaintiff cites G.S. § 1-539.15, which does provide for a two year statute of limitations in claims against municipalities, including claims in tort; this statute, however, did not become effective until 1 October 1975, *after* the incidents giving rise to plaintiff's action occurred and indeed after plaintiff's action had been commenced. *See* 1975 N.C. Sess.

Jones v. City of Greensboro

Laws, Ch. 361, § 3. G.S. § 1-539.15 is thus not controlling. We see no reason under the circumstances of this case to reach a different conclusion than the court in *Dennis v. City of Albemarle*, *supra*. Plaintiff also argues that certain provisions of the Charter of the City of Greensboro relating to notice and to maintenance of suits against the city dictate a longer limitations period; the Charter, however, provides that these provisions should not be construed to prevent any statute of limitations from commencing to run at the time the claim accrued, or to interfere with the running of any statute of limitations. Plaintiff's contentions as to a longer statute of limitations are therefore meritless.

[2] Plaintiff's fifth claim for relief, conspiracy, would not be barred by the one-year statute of limitations, since the claim alleges a continuing conspiracy on the part of defendants up to the time the trial on the second warrant was "nonsuited" on 26 June 1974, less than one year before plaintiff filed her complaint on 3 April 1975. Plaintiff would nevertheless be precluded from maintaining this claim.

In *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 258 S.E. 2d 379 (1979), *disc. rev. denied*, 299 N.C. 120, 261 S.E. 2d 923 (1980), Judge Erwin, speaking for this Court, said:

An action for civil conspiracy will lie when there is an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way, resulting in injury inflicted by one or more of the conspirators pursuant to a common scheme. [Citations omitted.]

Id., at 103, 258 S.E. 2d at 386.

Such an action is not one for damages caused by the conspiracy itself, but is one for damages caused by acts committed pursuant to a formed conspiracy; the charge of conspiracy itself does nothing more than associate defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one defendant might be admissible against all. *Shope v. Boyer*, 268 N.C. 401, 150 S.E. 2d 771 (1966).

In the present case, plaintiff has alleged generally that defendants assaulted, falsely arrested, falsely imprisoned, libeled, and maliciously prosecuted her, as well as abusing pro-

Jones v. City of Greensboro

cess with respect to her. In addition, plaintiff has alleged generally that defendants conspired to do all these things. Yet plaintiff uses the same alleged acts committed by defendants to support her conspiracy claim as she uses to support her claims for assault, false arrest, false imprisonment, libel, malicious prosecution, and abuse of process. Plaintiff cannot, however, use the same alleged acts to form both the basis of a claim for conspiracy to commit certain torts *and* the basis of claims for those torts. Since the trial court allowed plaintiff to maintain the other claims, except those barred by the statute of limitations, or by absolute privilege as hereinafter discussed, the court properly entered summary judgment for defendants on plaintiff's claim for conspiracy.

[3] Plaintiff's eighth claim for relief, libel of the second warrant, would not be barred by the one-year statute of limitations, since the second warrant was not issued until 3 April 1974, and plaintiff's complaint was filed 3 April 1975. The record discloses, however, an insurmountable bar to plaintiff's eighth claim, based upon absolute privilege. In actions for defamation, an absolute privilege attends communications made in the due course of judicial proceedings, *Mazzucco v. N.C. Board of Medical Examiners*, 31 N.C. App. 47, 228 S.E. 2d 529, *disc. rev. denied and appeal dismissed*, 291 N.C. 323, 230 S.E. 2d 676 (1976), and thus such communications will not support an action for libel. *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248 (1954). The term "judicial proceeding" is not restricted to trials in civil actions or criminal prosecutions, but includes every proceeding of a judicial nature before a competent court or before a tribunal or officer clothed with judicial or quasijudicial powers. *Jarman v. Offutt*, *supra*. Moreover, statements in pleadings and other papers filed in a "judicial proceeding" which are relevant or pertinent to the subject matter in controversy are cloaked with this absolute privilege. *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73, 81 S.E. 2d 146 (1954). In the present case, the record demonstrates that a "judicial proceeding" encompassed the second warrant from the time of its issuance through the trial ending in nonsuit, and clearly the statements in the warrant were relevant and pertinent to the subject matter in controversy. Thus, an absolute privilege attached to the warrant such that plaintiff's alleged claim for libel because of the second warrant was barred by such privilege.

Jones v. City of Greensboro

Summary judgment for defendants with respect to plaintiff's first, second, fifth, sixth, seventh, and eighth claims for relief must therefore be affirmed. The propriety of summary judgment in defendants' favor on plaintiff's ninth claim for relief will be discussed elsewhere in this opinion.

Plaintiff's second assignment of error is set out in the record as follows: "The Court erred in allowing defendants' motion for a protective order in answering the plaintiff's interrogatories and in ruling on defendants' motion for summary judgment prior to compelling the defendants to answer the interrogatories." We fail to see, however, how the court could have committed prejudicial error by these actions. As indicated previously, summary judgment for all defendants with respect to plaintiff's claims for relief nos. 1, 2, 6, and 7 was based on the statute of limitations, while summary judgment for all defendants on plaintiff's eighth claim was based upon absolute privilege. The answers to the interrogatories, on the other hand, did not relate to the time of the commencement of the action or the occurrence of the events upon which these claims were based, nor did they relate to any matters regarding libel or absolute privilege. Summary judgment was also granted for defendants on plaintiff's fifth claim, and the answers to the interrogatories would not have shed any light on that claim. Plaintiff has failed to show any prejudicial error, and thus this assignment of error is without merit.

Plaintiff's third and fourth assignments of error relate to the denial of her motions to amend her complaint. A motion to amend is addressed to the discretion of the trial court, and the trial court's ruling thereon is not reviewable on appeal in the absence of a showing of abuse of discretion. G.S. § 1A-1, Rule 15(a); *Helena Chemical Co. v. Rivenbark*, 45 N.C. App. 517, 263 S.E. 2d 305 (1980); *Willow Mountain Corp. v. Parker*, 37 N.C. App. 718, 247 S.E. 2d 11, *disc. review denied*, 295 N.C. 738, 248 S.E. 2d 867 (1978). Plaintiff has shown no abuse of discretion on the part of the trial court in denying her motions to amend, and thus the court's rulings are not reviewable. This assignment of error is without merit.

Plaintiff's fifth assignment of error is set out in the record as follows: "The Court erred in allowing defendants' Paul B. Calhoun's, City of Greensboro's, and the Greensboro Coliseum

Jones v. City of Greensboro

Complexes' [sic] motion for summary judgment as to all remaining causes of action." Plaintiff has not advanced any argument with respect to this assignment of error. It is therefore deemed abandoned. Rule 28(a), Rules of Appellate Procedure; *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980).

Plaintiff's sixth assignment of error is set out in the record as follows: "The Court erred in allowing defendants' motions for a directed verdict as to certain of plaintiff's causes of action at the close of plaintiff's evidence." The record discloses that plaintiff offered evidence in support of her alleged claims for relief nos. 3 (malicious prosecution with respect to the first warrant), 4 (malicious prosecution with respect to the second warrant), 10 (abuse of process with respect to the first warrant), and 11 (abuse of process with respect to the second warrant) with respect to defendants Apple, Briggs, Wrenn, and City of Greensboro. The evidence presented by plaintiff tended to show the following:

On 10 February 1974, plaintiff, a counselor employed by the Greensboro City Schools, had gone to the Greensboro Coliseum with her husband and son to see a circus scheduled to start at 2:00 p.m. Upon entering the Coliseum parking lot at approximately 1:30 p.m., plaintiff paid fifty cents for a ticket to park. No one told her where she could or could not park. Plaintiff parked her car in the "east section" or "right" of the parking lot, next to a white car. Several other cars were parked in the vicinity, while other people were parking "to the left." There was no one in the immediate area giving directions as to where to park and there were no signs that indicated plaintiff could not park there.

Plaintiff locked her car and fixed her hair while her husband and son got out and proceeded toward the Coliseum. The plaintiff got out and walked toward her husband and son. She noticed that they were talking to a uniformed officer, identified as defendant Briggs. Briggs asked plaintiff's husband to move the car, to which plaintiff's husband replied, "I'm not driving the car. She is." Briggs then said, "Well, it's going to be towed away," and plaintiff's husband replied, "Okay." Plaintiff's husband and son then "kind of moved on" and Briggs approached plaintiff and asked her if she was driving the car. Briggs told her that she needed to move the car. She replied that she

Jones v. City of Greensboro

“didn’t think” that she was going to move the car, and she asked who was in charge. Briggs answered, “Lieutenant Apple,” and crossed over to the other side of the lot to confer with another officer, identified as defendant Apple. Apple “yelled back” at plaintiff in a “loud” voice, saying, “Move it.”

Briggs returned and again informed plaintiff that she needed to move the car. Briggs stated that she had an “option,” that she either move the vehicle or it would be towed and she would have to pay \$15.00. Plaintiff replied, “Sir, I don’t think I’m going to move the car today and you will have to tow it in.” Plaintiff testified that the reasons for her refusal were that her family did not want to “miss the opening,” and that she felt “rather than wreck somebody else’s car in the parking lot, it was easier to let it stay there” until she could get to her husband to let him come move the car. Briggs did not tell her that she would be arrested if she did not move the car, or why he wanted the car moved.

Plaintiff continued to proceed toward the Coliseum, in order to talk with her husband about moving the car. Then she “felt these two hands” on her and she was “turned around” by Apple and Briggs. One of the officers said, “You’re under arrest,” to which plaintiff replied, “What for?” The officers then escorted plaintiff back through the parking lot, moving her at a pace “much faster than the ordinary pace.” Plaintiff was being held under her armpits. Plaintiff asked if she could go tell her husband and son that she was being arrested, but the officers refused. Plaintiff was placed in the back of a police car parked on the west side of the parking lot “from fifteen to twenty minutes.” While she was sitting in the police car, the officers looked at the contents of her purse. The officers refused to let plaintiff “pull the window down” to talk with her husband. A few minutes later, another officer, identified as defendant Wrenn, drove up, and plaintiff was transferred to Wrenn’s vehicle. Plaintiff asked if they would read her “my rights,” and one of the officers did so. Plaintiff was taken to the magistrate’s office by Wrenn, where Wrenn gave a statement as to “what the situation was” and signed an affidavit. Plaintiff was then served with a warrant and was released from custody. Up until the time she was taken from the Coliseum parking lot to the magistrate’s office in downtown Greensboro, plaintiff testified that she never saw anyone else move a car, any cars get towed,

Jones v. City of Greensboro

or anyone else get "arrested."

Plaintiff's evidence further tended to show that following the events of 10 February 1974, plaintiff made a motion to quash the warrant on 6 March 1974, and the motion was allowed on 3 April 1974. While plaintiff was present at court on 3 April 1974, she was served with a second warrant, signed by Briggs. Plaintiff was brought to trial on the second warrant on 26 June 1974, but the case was "nonsuited." Calling the above-described events "humiliating and intimidating," plaintiff testified that there had been several "repercussions" from the incident, such as her son was now "frightened to death" of every police officer he saw, and that plaintiff was "worried" that her chances for promotion at work had been affected. At the close of plaintiff's evidence, the court directed a verdict for these four defendants on plaintiff's third, tenth, and eleventh claims, and for defendant Wrenn on plaintiff's fourth claim.

[4,5] In order to recover in an action for malicious prosecution, the plaintiff must establish that the defendant instituted or caused to be instituted against him a criminal proceeding (or, in certain instances, civil actions) with malice and without probable cause, and that such proceeding has been terminated in the plaintiff's favor. *Koury v. John Meyer of Norwich*, 44 N.C. App. 392, 261 S.E. 2d 217, *disc. rev. denied*, 299 N.C. 736, 267 S.E. 2d 662 (1980); *Denning v. Lee*, 35 N.C. App. 565, 241 S.E. 2d 706 (1978). An action for malicious prosecution must be based upon valid process, *Bassinov v. Finkle*, 261 N.C. 109, 134 S.E. 2d 130 (1964), and if a warrant does not accurately and clearly allege all the constituent elements of an offense, the warrant is invalid and cannot be used as the basis for a malicious prosecution action. *Hawkins v. Reynolds*, 236 N.C. 422, 72 S.E. 2d 874 (1952). To recover in an action for abuse of process, the plaintiff must establish (1) the existence of an ulterior purpose on the part of the defendant, and (2) an act in the use of the process which is not proper in the regular prosecution of the proceeding. *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223 (1955).

[6,7] We are of the view that the evidence presented by plaintiff, when considered in the light most favorable to plaintiff, is insufficient to require submission to the jury of the claims for malicious prosecution and abuse of process with respect to the first warrant and for abuse of process with respect to the second

Jones v. City of Greensboro

warrant, or to require submission to the jury of the claim for malicious prosecution based on the second warrant with respect to defendant Wrenn. The record demonstrates that the first warrant, issued 10 February 1974, did not accurately and clearly allege all the constituent elements of an offense, as evidenced by the court's granting plaintiff's motion to quash the warrant on 3 April 1974. Furthermore, we have examined the warrant which was quashed and conclude that it does not accurately and clearly allege the elements of an offense. The first warrant was therefore invalid and could not support an action for malicious prosecution. Also, plaintiff presented no evidence upon which an inference could be drawn as to either ulterior purpose on the part of defendants Apple, Briggs, Wrenn, and City of Greensboro or any improper act by them in the use of either warrant in the course of plaintiff's prosecution. In addition, the evidence clearly indicates that defendant Wrenn had nothing to do with the prosecution of plaintiff after the issuance of the first warrant. The trial court properly directed verdicts in favor of defendants Apple, Briggs, Wrenn, and City of Greensboro on plaintiff's claims nos. 3, 10, and 11, and in favor of defendant Wrenn on plaintiff's fourth claim. This assignment of error is without merit.

[8] Plaintiff next contends, based upon her seventh assignment of error, that the trial court erred in instructing the jury at the close of plaintiff's evidence that it had allowed certain of defendants' motions for a directed verdict. Plaintiff argues that such information is "not necessary for the jury to fully understand the proceedings before it" and to bring such information to the attention of the jury is "prejudicial." We, however, disagree, and find no prejudicial error in the court's comments, and this assignment of error will not be sustained.

[9] When counsel for defendants had concluded his direct examination of defendant Apple, the trial court directed further questions to Apple concerning the flow of traffic in the Coliseum parking lot and the effect of not parking in accordance with the plan used to park cars in the lot when there are consecutively scheduled events at the Coliseum. In addition, while defendant Briggs was on the stand as a defense witness, the court asked questions of Briggs concerning whether he and defendant Apple had told plaintiff "to move her car." These

Jones v. City of Greensboro

questions by the court form the basis of plaintiff's eighth assignment of error. Plaintiff argues that the questions directed to Apple were "hypothetical questions" which "adjudicated defendant [Apple] an expert entitled to speak to hypothetical situations and have his opinion believed as an expert," and that the testimony of Apple in response to the questions was irrelevant. With respect to the questions directed to Briggs, plaintiff argues that Briggs' answers were "non-responsive" and should have been limited for "corroboration." As a result of the court's questions, plaintiff contends she was "prejudiced." We do not agree.

The questions asked by the court were for the purpose of clarifying the testimony of Apple and Briggs, and the testimony elicited in response was relevant to the matters in issue. We note that plaintiff was allowed in each instance to ask questions of the witness following the examination by the court. In our view, plaintiff has failed to show any prejudicial error in the court's questioning of Apple and Briggs, and this assignment of error is without merit.

[10] By her ninth, tenth, and eleventh assignments of error, plaintiff contends that the court erred in denying her motions as to defendants Apple, Briggs, and City of Greensboro for a directed verdict on plaintiff's fourth claim, and for peremptory instructions on the elements of malicious prosecution, including such an instruction on the issue of "malice imputed." We disagree. Defendants Apple, Briggs, and City of Greensboro offered evidence tending to show the following: Defendant Briggs was the only officer present at the court hearings on the criminal charges arising out of the incident. At the 3 April 1974 hearing, the first warrant was quashed "for some technicality" and the District Attorney instructed Briggs on how the warrant should have been drawn. Briggs then went to the magistrate's office and had the second warrant drawn in accordance with the instructions. Briggs brought it back to the courtroom and served it upon plaintiff. Briggs testified at the 26 June 1974 trial on the second warrant, after which the trial judge dismissed the case.

We are of the opinion that the foregoing evidence, together with any inferences raised in defendants' favor from plaintiff's evidence, is sufficient to raise questions for the jury to deter-

Jones v. City of Greensboro

mine regarding the existence of malice, either actual or imputed, and the existence of the other essential elements of malicious prosecution. The court's rulings challenged by these assignments of error were therefore proper, and these assignments of error are without merit.

Plaintiff's twelfth assignment of error is addressed to the court's instructions to the jury. Based on this assignment of error, plaintiff argues (1) the court should have peremptorily instructed on each element of malicious prosecution; (2) the court's definition of "probable cause" should have referred to a "cautious man" instead of a "person of ordinary prudence"; (3) the court failed to charge that advice of counsel does not preclude recovery for plaintiff; (4) the court should have charged that defendants Apple and Briggs were "off-duty working as private citizens in the capacity of parking lot attendants;" (5) the court should have peremptorily charged that "the parking lot was private property owned by the city in its proprietary function," such that defendants Apple and Briggs were without authority to arrest plaintiff under G.S. § 20-114.1; (6) the court's definition of malice was "inaccurate and incomplete"; (7) the court should have charged that malice could be imputed from, and that damages could be based upon, the actions of defendants beginning 10 February 1974, and not 3 April 1974, when the warrant upon which the claim was based was issued; (8) the court should have repeated verbatim the instructions given with respect to the first issue when instructing upon the second issue; and (9) the court should not have repeated the erroneous instructions in response to a question from the jury, when the answer to the question asked did not require such repetition. We have examined the trial court's charge in light of plaintiff's contentions, and find that the charge, when considered contextually as a whole, is fair, correct, and adequate, and is free from prejudicial error. Plaintiff's twelfth assignment of error is without merit.

Plaintiff's thirteenth assignment of error, contending that the court erred in failing to set aside the verdict and in not entering judgment for plaintiff notwithstanding the verdict is meritless.

Finally, plaintiff contends that the court erred in entering summary judgment for all defendants on plaintiff's ninth claim

Jones v. City of Greensboro

for relief. We note at the outset that the court considered only the pleadings in entering summary judgment for defendants with respect to this claim for relief, but defendants' motion was one for dismissal pursuant to Rule 12(b)(6), for judgment on the pleadings, and in the alternative for summary judgment. We therefore treat the court's order pursuant to defendants' motion, insofar as it dealt with plaintiff's ninth claim, as an order dismissing plaintiff's ninth claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

[11] With respect to her ninth claim for relief, plaintiff argues that dismissal was improper because this claim, despite the fact that a specific reference to 42 U.S.C. § 1983 was not made, stated a claim for relief under that statute. Section 1983 at the time this suit was instituted, provided:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Municipalities have been held to be "persons" under 42 U.S.C. § 1983, such that they are amenable to suit under the statute. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978); *see also Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398, *rehearing denied*, — U.S. —, 64 L. Ed. 2d 850, 100 S. Ct. 2979 (1980). State courts have concurrent jurisdiction with federal courts to entertain actions under § 1983, and thus § 1983 claims can be instituted and maintained in the courts of this State. *Williams v. Greene*, 36 N.C. App. 80, 243 S.E. 2d 156, *disc. rev. denied and appeal dismissed*, 295 N.C. 471, 246 S.E. 2d 12 (1978).

In *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979), the Supreme Court of this State (per Justice Exum) stated:

A complaint is deemed sufficient to withstand a motion to dismiss under Rule 12(b)(6) where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature

Jones v. City of Greensboro

and extent of the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

Id., at 719, 260 S.E. 2d at 613. In addition, a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Presnell v. Pell*, *supra*; *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In testing the sufficiency of the claim, the complaint must be liberally construed, *Benton v. W.H. Weaver Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975), and when the allegations give sufficient notice of the wrong of which plaintiff complains, the incorrect choice of the legal theory upon which the claim is bottomed should not result in dismissal if the allegations are sufficient to state a claim under some legal theory. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979).

The above stated rules are no different for claims under § 1983. See *Slavin v. Curry*, 574 F. 2d 1256, *rehearing denied*, 583 F. 2d 779 (5th Cir., 1978); *Williams v. Vincent*, 508 F. 2d 541 (2d Cir. 1974); *Cruz v. Cardwell*, 486 F. 2d 550 (8th Cir. 1973); *Kauffman v. Moss*, 420 F. 2d 1270 (3d Cir. 1970), *cert. denied*, 400 U.S. 846, 27 L. Ed. 2d 84, 91 S. Ct. 93 (1970).

When the allegations in plaintiff's complaint are liberally construed in light of the foregoing rules of substance and procedure, we hold they are sufficient to state a claim for relief under 42 U.S.C. § 1983 against defendants Apple, Briggs, Wrenn, Calhoun, and City of Greensboro. Defendants Greensboro Police Department and Greensboro Coliseum Complex would not be amenable to suit under § 1983 since they are component parts of defendant City of Greensboro and as such lack the capacity to be sued. Thus, we hold the trial court erred in dismissing plaintiff's ninth claim for relief for failure to state a claim upon which relief could be granted with respect to defendants Apple, Briggs, Wrenn, Calhoun, and City of Greensboro.

The result is: Summary judgment for all defendants with respect to claims for relief nos. 1, 2, 5, 6, 7, and 8 is affirmed; summary judgment for defendants Calhoun, Greensboro Police Department, and Greensboro Coliseum Complex on the remaining claims for relief (except for plaintiff's ninth claim for relief with respect to Calhoun) is affirmed; judgment directing verdict in favor of defendants Apple, Briggs, Wrenn, and City of

State v. Douglas

Greensboro on claims for relief nos. 3, 10, and 11 is affirmed; no error in the trial with respect to the fourth claim for relief; judgment dismissing the ninth claim for relief as to defendants Apple, Briggs, Wrenn, Calhoun, and City of Greensboro is reversed and the cause is remanded to the Superior Court, Guilford County, for further proceedings.

Affirmed in part; no error in part; reversed and remanded in part.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. PAUL EMANUEL DOUGLAS

No. 8020SC1023

(Filed 5 May 1981)

1. Searches and Seizures § 12– investigatory stop – reasonable suspicion of criminal activity

An officer had an articulable and reasonable suspicion that defendant was engaged in criminal activity so as to justify an investigatory stop of a car driven by defendant where the officer observed at 12:34 a.m. that the car's trunk lid was tied down over a washing machine and that another white appliance, a dryer, was in the rear passenger area of the vehicle, and where the officer was aware of several prior thefts of washers and dryers from a nearby mobile home dealer.

2. Searches and Seizures § 34– items in vehicle – seizure under plain view rule

A washer and dryer were lawfully seized from defendant's car without a warrant pursuant to the plain view rule where an officer made a proper investigatory stop of defendant's car, and the seizure of the washer and dryer occurred after the officer had been informed by another officer that a washer and dryer had been removed from a nearby mobile home.

3. Burglary and Unlawful Breakings § 2– breaking or entering a building – mobile home on dealer's lot

An unoccupied mobile home not affixed to the premises and intended for retail sale is a "building" within the meaning of the statute prohibiting the breaking or entering of buildings, G.S. 14-54.

4. Larceny § 6.1– identity of stolen items

The manager of a mobile home dealership was properly permitted to describe pillows, curtains and a bedspread found in defendant's car as being identical to those taken from a mobile home on the dealer's lot.

Judge BECTON dissenting.

State v. Douglas

APPEAL by defendant from *Mills, Judge*. Judgment entered 5 June 1980 in Superior Court, STANLY County. Heard in the Court of Appeals 5 March 1981.

Defendant was indicted on charges of breaking or entering, and larceny and receiving. The jury returned verdicts of guilty of felonious breaking or entering, and of felonious larceny.

The State's evidence tended to show that at 12:34 a.m. on 5 March 1980 Officer J.E. Galliher of the Albemarle Police Department stopped an automobile, driven by defendant and registered in the name of a passenger in the car, containing a washing machine and a pair of curtains in the trunk, and a dryer, two pillows, a set of curtains on curtain rods and a bedspread in the rear passenger area. In response to Officer Galliher's request, defendant was unable to produce his driver's license. Galliher then radioed the Albemarle Police's Communication Department to make a driver's license check on defendant. Galliher also radioed Officer L.C. Ingold to request that Ingold check the Conner Mobile Homes lot, located approximately one-half mile from where defendant's car was stopped, for a possible breaking, entering and larceny of a washer and dryer. While still awaiting the record check, Ingold informed Galliher that a Conner mobile home had been opened and a washer and dryer apparently removed. At this point Galliher advised defendant and the passenger of their *Miranda* rights, seized the vehicle, and took them to the Stanly County jail. Defendant later signed a statement admitting the break-in of the mobile home and the larceny of the washer, dryer, curtains and pillows. The manager of Conner Mobile Homes, Donald Harwood, identified the washer and dryer taken from defendant's car as the property of Conner Mobile Homes by matching serial numbers. Harwood also described the pillows, curtains and bedspread found in the car as being identical to those removed from the mobile home.

Defendant offered no evidence.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Ben G. Irons, II, for the State.

Hopkins, Hopkins and Tucker, by Samp C. Hopkins, Jr., for defendant appellant.

WELLS, Judge.

State v. Douglas

Defendant's first assignment of error is grounded on the contention that Officer Galliher lacked probable cause to stop and detain defendant and therefore violated defendant's rights under the Fourth Amendment of the United States Constitution. At the *voir dire* examination held for the purpose of determining the basis for probable cause for the stop, Officer Galliher testified that his attention was attracted to defendant's car on 5 March, initially because of a twelve inch piece of cloth hanging out of the trunk over the rear bumper. Galliher also observed that the car's trunk lid was tied down over a washing machine and that another white appliance, a dryer, was in the rear passenger area of the vehicle. These circumstances at the time of night, 12:34 a.m., aroused Galliher's suspicion. Galliher explained that he was aware of several prior thefts of washers and dryers from Conner Mobile Homes, and that he felt it was necessary "to stop the vehicle and advise him that there was in fact something hanging out of the vehicle and to inquire as to what he was doing with the two appliances and material hanging out of the vehicle." Defendant contends that Galliher's suspicions were not sufficiently articulable or reasonable to justify a stop of defendant's vehicle. We disagree.

[1] In appropriate circumstances even absent probable cause to arrest, police officers may temporarily approach and detain an individual for purposes of investigating "possible criminal behavior." *State v. Greenwood*, 47 N.C. App. 731, 735, 268 S.E. 2d 835, 838 (1980), *reversed on other grounds*, 301 N.C. 866, 273 S.E. 2d 438 (1981); *see, State v. Tillett*, 50 N.C. App. 520, 274 S.E. 2d 361 (1981). If a police officer can specify an articulable and reasonable suspicion that criminal activity is afoot, *State v. Streeter*, 283 N.C. 203, 210, 195 S.E. 2d 502, 507 (1973), then a brief stop of the suspicious individual in order to maintain the status quo momentarily while obtaining more information does not violate Fourth Amendment rights. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E. 2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143, 100 S. Ct. 220 (1979). Based on the totality of the circumstances as perceived by Officer Galliher, we hold that Galliher possessed such articulable and reasonable suspicion, *State v. Thompson*, *supra*, as would justify the investigatory stop of defendant in this case. *See, State v. Greenwood*, *supra*, at 736-38, 268 S.E. 2d at 838-39; *In re Beddingfield*, 42 N.C. App. 712, 715-16, 257 S.E. 2d 643, 645 (1979); G.S. 20-183(a). Noting that

State v. Douglas

defendant did not appeal from the trial court's finding of fact at the conclusion of the *voir dire* that Galliher was informed of the break-in at Conner Mobile Home within a "very short time" of the stop, we uphold the trial court's conclusion of law that defendant's detention for this short period of time was reasonable and did not violate defendant's Fourth Amendment rights. *See, State v. Bridges*, 35 N.C. App. 81, 239 S.E. 2d 856 (1978).

[2] Defendant also asserts that the washer and dryer were illegally seized by the police and that it was error not to exclude such evidence. Stating the four requisite elements of the plain view doctrine — a prior valid intrusion, inadvertent discovery, a nexus between the items and criminal behavior, and plain view — *State v. Wynn*, 45 N.C. App. 267, 262 S.E. 2d 689 (1980); *see also, Coolidge v. New Hampshire*, 403 U.S. 443, 446, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), *but see, State v. Mitchell*, 300 N.C. 305, 310-11, 266 S.E. 2d 605, 609 (1980) (questioning the requirement that the discovery be inadvertent), defendant argues that two of the elements were not present in this case. Defendant's first contention, *i.e.*, that Officer Galliher was not in a place where he had a right to be, is without merit because of our determination that the investigatory stop of defendant's vehicle was permissible. Defendant's second contention is that the washer and dryer viewed by Galliher were not incriminating in any manner. This contention is without merit because the seizure of the washer and dryer did not occur until after Galliher was informed by Ingold that a washer and dryer had been removed from a nearby Conner mobile home. At that point, a nexus was established between the items and criminal behavior, *State v. Wynn, supra*, and the plain view doctrine applied to justify the warrantless seizure. *State v. Bridges, supra*, at 85, 239 S.E. 2d at 859.

Defendant next assigns error to the admission of defendant's confession into evidence. Defendant bases this assignment on the alleged illegality of the stop of defendant's vehicle, the detention and arrest of defendant, and the seizure of the washer and dryer. As we have already concluded that each of these acts was proper, this assignment is without merit and is therefore overruled.

[3] Defendant's fourth assignment of error concerns the charges contained in the indictment of defendant. Defendant was charged with violating G.S. 14-54, which provides:

State v. Douglas

§ 14-54. Breaking or entering buildings generally. —

(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2.

(b) Any person who wrongfully breaks or enters any building is guilty of a misdemeanor and is punishable under G.S. 14-3(a).

(c) As used in this section, “building” shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

Defendant asserts that the State’s evidence showed only a violation of G.S. 14-56 (Supp. 1979), which prohibits breaking and entering “any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind containing any goods, wares, freight, or other thing of value. . . .” Defendant contends that the trial court erred in denying defendant’s motion to quash the indictment.

The question presented is whether an unoccupied mobile home not affixed to the premises and intended for retail sale, is a “building” within the meaning of G.S. 14-54. We hold that it is. A mobile home is clearly a “structure designed to house or secure within it . . . activity or property.” Such a structure that is uninhabited or under construction also is within the statute’s language. The mere fact of a mobile home’s capability of being transported from place to place on wheels attached to its frame, should not remove it from the ambit of G.S. 14-54. *See, United States v. Lavender*, 602 F. 2d 639 (4th Cir., 1979).

[4] Defendant’s final assignment of error concerns the admission of Donald Harwood’s testimony identifying the curtains, bedspread and pillows found in defendant’s vehicle as those items missing from the Conner mobile home. On *voir dire* Harwood testified that the items found in defendant’s vehicle were the identical color and size as those taken from the mobile home but that he could not “say for a fact that they were ours.” After the *voir dire*, the trial judge made findings of fact and concluded that the identification testimony was admissible. There was no error in this ruling. Evidence is relevant if it has any logical

State v. Douglas

tendency to prove the fact in issue. *See, State v. Collins*, 35 N.C. App. 250, 252, 241 S.E. 2d 98, 99 (1978); 1 Stansbury's N.C. Evidence § 77, at 234 (Brandis rev. 1973). Harwood's ability to identify the items was sufficient to provide the basis upon which the jury might reasonably infer that the items found in defendant's vehicle were those taken from the mobile home. *See, State v. Bembery*, 33 N.C. App. 31, 37, 234 S.E. 2d 33, 37, *disc. rev. denied*, 293 N.C. 160, 236 S.E. 2d 704 (1977). This assignment of error is overruled.

No error.

Judge VAUGHN concurs.

Judge BECTON dissents.

Judge BECTON dissenting:

My reading of the record in this case and the relevant case law requires that I dissent. The court's holding that Officer Galliher's warrantless stop of the defendant was based on a constitutionally sufficient and reasonable suspicion that the defendant was engaged in criminal activity is speculative at best and violative of the defendant's Fourth and Fourteenth Amendment rights at the very least. In order to conduct an investigatory stop and detention of an individual, the United States Supreme Court has held that a police officer must have a reasonable suspicion, grounded in articulable and objective facts, that the individual is engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979). *See also State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143, 100 S. Ct. 220 (1979); *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973). In *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979), the Court applied the same principle to police stops of motor vehicles citing with approval the Delaware Supreme Court's opinion that:

a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution.

State v. Douglas

440 U.S. at 651, 59 L. Ed. 2d at 665-66, 99 S. Ct. at 1394.

I find no evidence in the record to support the majority's holding that Officer Galliher had a *reasonable* suspicion, *prior* to stopping the defendant's car, that the defendant was engaged in criminal activity. During direct examination by the State on *voir dire*, Officer Galliher testified to the contrary, strongly suggesting that he had no suspicions: "I followed the 1970 Oldsmobile and stopped it because I wanted to advise the driver that the cloth was in fact hanging out of the trunk." Later on cross examination by defense counsel, Galliher added further, "My purpose in following him, was to inform the operator that he had something hanging out of his trunk *and that was my only purpose*. I was not stopping the vehicle for any traffic violations. I was just going to perform a public service." (Emphasis added.)

The facts relied on by the majority to support finding a reasonable suspicion were that Officer Galliher observed a car with its trunk lid tied down over what appeared to be a washing machine; that a piece of cloth was hanging out of the car's trunk over its bumper; that it was 12:34 a.m. at night; and that Officer Galliher had personal knowledge of thefts from nearby Connor Mobile Homes at various, but unspecified, times in the past. Galliher also testified, however, that the defendant was operating his car properly and was not violating any traffic laws. He further stated that it was not unusual for people to be traveling in and around Albemarle at that time of night: "it's quite congested between the hours of 12 and 1 a.m. due to mill traffic. It is not unusual for traffic to be in that area at this time in the morning." Moreover, nowhere in the record is there any evidence that the thefts from Connor Mobile Homes known about by Officer Galliher were recent thefts, or ones involving a car like the defendant's car, or even ones involving individuals that fit the defendant's general description. At best then, the only truly unusual thing about the defendant or his car that night was that a piece of cloth was hanging out of his trunk over his bumper. In light of the officer's complete testimony on *voir dire*, the facts relied upon by the majority are so commonplace and innocuous that I cannot see how they support a suspicion on the part of the police that the defendant was engaged in any criminal activity.

State v. Douglas

The facts in this case are distinguishable from the recent North Carolina Supreme Court decision in *State v. Thompson, supra*. In *Thompson*, the court found that the police officer's suspicion that criminal activity was taking place was reasonable and based on specific facts that would give rise to such a suspicion. The facts relied upon were that a van was seen late at night parked in the parking lot of a public boat landing at a time when the lot was not generally in use; that the police had earlier that same evening heard reports of house break-ins in that particular area and that the break-ins were conducted by individuals using a van. Under these circumstances, the police were found to be justified in making an investigatory stop, detention and inquiry of the defendants. *But see* 296 N.C. at 708-10, 252 S.E. 2d at 780-81 (J. Exum dissenting).

In the case at bar, however, the defendant was stopped and detained at a time and place in which it was not unusual for the defendant to be travelling. Officer Galliher had no information at the time of the stop that a break-in at Connor Mobile Homes had occurred, nor was he on alert for a particular car or suspects fitting the description of the defendant. In short, the type and quality of evidence available to the police in *Thompson* giving rise to a reasonable suspicion that criminal activity might be taking place, was unquestionably absent in the case before us.

Officer Galliher's stop of the defendant, then, was not based on a *reasonable* suspicion that criminal activity was afoot. Even if the stop was permissible as a safety stop for the purpose of warning the defendant about the cloth hanging from his trunk, the officer, absent probable cause to detain the defendant, should have made his public safety warning to the defendant as he did, and then let the defendant leave. It was wholly improper for Officer Galliher to ask for the defendant's driver's license. He testified that, "I asked Mr. Douglas for his North Carolina operator's license, because I wanted to insure he, in fact, had an operator's license and to establish his identity." In *Delaware v. Prouse, supra*, the United States Supreme Court specifically held that a police officer without probable cause cannot randomly stop a car and detain its driver in order to check his license and registration; such a stop and inquiry is violative of the Fourth Amendment and is an unreasonable seizure. 440

Alva v. Cloninger

U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391. *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975). Under the circumstances then, it makes no difference that Officer Galliher learned of the Connor Mobile Homes break-in while still awaiting the license check on the defendant. At the time, the defendant had already been subjected to an unreasonable stop and detention in violation of his Fourth Amendment rights.

For the Fourth Amendment to have any vitality at all, it must be read and enforced to assure private citizens that their rights and expectations of privacy will not be infringed upon by the State based on less than reasonable suspicions of the police officer in the field, however well intending. Freedom to move about in an unrestricted fashion without fear of unreasonable stops and detentions is at the heart of the Fourth Amendment's prohibition against unreasonable searches and seizures. It is in deference to these higher principles that I dissent and would order the suppression of the illegally obtained evidence in question.

JUAN ALVA AND WIFE, ELSA M. ALVA v. WILLIAM HARRILL
CLONINGER

No. 8015SC825

(Filed 5 May 1981)

1. Contracts § 14.2— appraisal contract – no contract for benefit of third person

There was no merit to plaintiffs' contention that they were entitled to recover on a contract as its intended beneficiaries and that the trial court erred in granting a directed verdict for defendant on plaintiffs' contract claim where the evidence tended to show that plaintiffs entered into a contract to purchase a house; defendant appraised the house pursuant to an agreement with the lending institution to which plaintiffs had applied for a loan in connection with their contract to purchase; the lending institution considered the appraisal and several other factors in processing plaintiffs' loan application; while it was clear that plaintiffs did stand to benefit from a favorable appraisal to the extent that their loan application hinged on the appraisal, such benefit was merely incidental to the purpose of the agreement between the lending institution and defendant; defendant was not instructed by the bank to provide plaintiffs with a copy of the appraisal

Alva v. Cloninger

report, and the bank did not furnish plaintiffs with a copy; and the plaintiffs' evidence did not establish a claim as intended beneficiaries, for there was no recital that the contract was entered into for their direct benefit.

2. Negligence § 2—contract to appraise house—negligent performance—sufficiency of evidence

In plaintiffs' action to recover damages from defendant for loss suffered in the purchase of a house which had serious structural defects where plaintiffs alleged that the lending institution from which they sought funds to purchase the house hired defendant to make an appraisal and defendant failed to discover and to disclose in his appraisal report the serious structural defects in the house, the trial court erred in directing a verdict for defendant on plaintiffs' tort claim at the close of plaintiffs' evidence, since one plaintiff's testimony that he discovered numerous defects almost immediately upon moving into the house, coupled with expert opinion testimony that such defects existed at the time of the appraisal, was sufficient to support but not compel a jury's finding that the defects existed when defendant inspected the house; plaintiffs produced expert testimony that an appraiser using due care would have discovered and disclosed such defects; there was evidence from which the jury could have concluded that defendant should have reasonably foreseen and expected that plaintiffs would rely on his appraisal report; the evidence warranted an inference that plaintiffs actually relied on defendant's appraisal report to the lending institution and that defendant's failure to discover and disclose the alleged defects in the house was a proximate cause of plaintiffs' injury; and the evidence presented at trial was therefore sufficient to permit a reasonable inference of negligence, and the case should have been submitted to the jury notwithstanding the lack of privacy.

3. Evidence § 47—duties of appraiser—expert testimony

In response to properly phrased questions, an expert should be allowed to assist the jury in determining the duties of a competent appraiser.

APPEAL by plaintiffs from *Brewer, Judge*. Judgment entered in Superior Court, ORANGE County, 5 June 1980. Heard in the Court of Appeals 10 March 1981.

Plaintiffs commenced this civil action on 1 June 1979, seeking to recover damages from defendant on alternative theories of contract and tort for economic loss suffered in the purchase of a house that had serious structural defects. Defendant appraised the house pursuant to an agreement with NCNB Mortgage Corporation (NCNB), the lending institution to which plaintiffs had applied for a loan in connection with their contract to purchase. Plaintiffs allege (1) that they contracted in January 1977 to purchase a house in Chapel Hill for \$53,000; (2) that the contract was conditioned on their ability to secure a loan for the purchase; (3) that their loan application with NCNB

Alva v. Cloninger

required an appraisal of the property before the loan could be approved; (4) that they paid NCNB \$100 for the appraisal; (5) that NCNB hired defendant to make the appraisal; and (6) that defendant's appraisal report showed (a) the house had a market value of \$53,500 and (b) there were "no visible major problems" with the house. Plaintiffs contend that defendant failed to discover, and to disclose in his appraisal report, the serious structural defects to the house; that defendant breached his contract with NCNB when he failed to discover the defects; and that defendant breached his duty to exercise ordinary care by failing to discover the defects.

Defendant, in his Answer, denied that the property was subject to any apparent defects on 2 February 1977 and denied any negligence or breach of contract. As a further defense, defendant alleged that plaintiffs had no standing to sue defendant because there was no privity of contract between defendant and plaintiffs. Defendant contends that the plaintiffs were not third-party beneficiaries to the contract with NCNB and that it was not foreseeable that plaintiffs would be injured if defendant negligently performed his contract with NCNB.

The issues on appeal are whether the court erred in granting defendant's motion for a directed verdict at the close of plaintiffs' evidence and whether the court erred in excluding certain testimony.

Plaintiffs' evidence was as follows. Dr. Juan Alva testified that in January 1977 he contacted a realtor who showed him a house at 600 Yorktown Drive, and that he actually walked through the house twice before signing the contract. After signing the purchase contract, which was conditioned on his receiving a loan, Dr. Alva talked to Roy McGhee, the loan officer at NCNB, who told Dr. Alva that the house would have to be appraised before Dr. Alva's loan application could be approved. Dr. Alva paid NCNB \$100 to have the appraisal done. Although the closing was in April 1977, Dr. Alva and his family did not move into the house until June 1977. Almost immediately they began noticing defects. Specifically, Dr. Alva testified:

After we moved into the house, we did notice something unusual about the house. Actually, it was Elsa who pointed out that the floor in the dining room was sloping and there was a bump on the concrete. And the children told me that

Alva v. Cloninger

they would put little balls on the floor and they would roll out toward the rear. It was sort of like a jigsaw puzzle. I started finding other things, looking around the house and finding cracks in the bricks. It seemed that the whole structure had shifted down, and the entire house was sloping.

. . . .

As I recall, we discovered the defects very fast after moving in . . . [f]or instance, the doors would close by themselves. There were bricks covered with some kind of cloth to keep them open, and also the doors in the cabinets in the kitchen, you opened them and they would fall apart. . . . In the rear of the house there is a deck. I looked at it and saw several cracks and a separation. The separation, as we were living, actually increased, so we could actually tell that it was getting worse all the time.

In all, plaintiffs presented evidence of twenty-eight separate defects "that existed in June or July of 1977."¹ Plaintiffs testified that they tried unsuccessfully, after June 1977, to get the appraisal report from NCNB and from defendant Cloninger who, by that time, had moved to Kentucky. (Plaintiffs received a copy of the appraisal report after commencing this action.)

In December 1977, at a time when the defendant returned to Chapel Hill, plaintiffs showed defendant the defects they had noticed in the house. Defendant told plaintiffs at that time that if the defects had been there on 2 February 1977 he would have noticed them.

Benjamin Wilson, an engineer employed by Soil Testing Services, inspected plaintiffs' house in January 1979 and found extensive cracks in the masonry and sloping of the floors. He inspected the property again on 2 June 1979 and found additional damage. Ernest F. Parker, Jr., a vice president and principal engineer for Soil Testing Services, testified that he inspected

¹ Dr. Alva testified about the twenty-eight defects listed in Plaintiffs' Exhibit No. 1 without objection. Wallace B. Kaufman, who was qualified as an expert in real estate construction and appraisal actually prepared Plaintiffs' Exhibit No. 1 after he inspected the house in 1979. Subsequent to Kaufman's testimony, Plaintiffs' Exhibit No. 1 was received into evidence.

Alva v. Cloninger

plaintiffs' property on 2 June 1979 with Wilson and determined that the soil supporting the rear foundation wall had compressed, causing the defects. Comparing his observations with the notes from another engineer's inspections in 1978 and 1979, Parker saw only a slight increase in the damage in that one year period. In his opinion, the major part of the settlement of the house would have occurred in the first few years after it was built in 1972, and the cracking would have begun to show within the first year. Parker later testified that the house appeared to be built on fill, and that the nature of the fill material could affect the timing and speed of the house's settlement. (Out of the jury's presence, Parker and Wallace Kaufman, a real estate broker and appraiser, estimated the cost of repairing the house.)

Wallace Kaufman testified (when the jury returned) that he inspected plaintiffs' property in March 1979. Kaufman assumed that the defects were present in February 1977 and, therefore, would have expected defendant to list the defects in his appraisal. In Kaufman's opinion, a competent appraiser exercising reasonable and ordinary care would have included at least the major defects in an appraisal and would have appraised the plaintiffs' property in February 1977 at \$38,500. Without the defects, the fair market value in February 1977 would have been \$55,000. Kaufman did not personally know the condition of the property on 2 February 1977.

Roy McGhee, a mortgage loan officer at NCNB testified that if an appraisal indicates a major defect, both the realtor and the buyer are advised that either the repairs must be made before closing or the loan will be denied. No defects were mentioned before the closing on 29 April 1977. McGhee further testified that he had found defendant to be a dependable appraiser and that appraisals are done for the bank's benefit in determining whether to lend on the property appraised. If the appraisal had listed the defects, it would have benefited plaintiffs because McGhee would have informed them of the defects.

Defendant testified that when he went back to plaintiffs' house at plaintiffs' request in December 1977, he saw defects in the house that had not been there in February, 1977. The defects were so noticeable that they could not be missed, and he would have listed these defects if they had been there in Febru-

Alva v. Cloninger

ary 1977. The appraisal he gave NCNB on 2 February 1977 was accurate based on his inspection of plaintiffs' property.

Epting, Hackney & Long, by Joe Hackney, for plaintiff appellants.

Moore & Emmerson, by Joseph I. Moore, Jr., for defendant appellee.

BECTON, Judge.

[1] Plaintiffs first contend that the court erred in granting a directed verdict for defendant on plaintiffs' contract claim at the close of plaintiffs' evidence. Plaintiffs argue that they are entitled to recover on the contract as its intended beneficiaries since it was stipulated that "NCNB Mortgage Corporation contracted with defendant to provide an appraisal report and an appraisal fee of \$100 was paid to the defendant by NCNB Mortgage Corporation subsequent to the submission of the appraisal report."

According to plaintiffs, there was evidence sufficient to show, prima facie, (1) that defendant breached his contract with NCNB; (2) that defendant was aware that Dr. Alva was the "Borrower/Client"; (3) that defendant was required to inspect the property "inside and out" and report any defect which would impair market value; (4) that the defects which existed at the time of purchase also existed at the time of appraisal; and (5) that defendant failed to report any defects. This evidence, plaintiffs maintain, should have gone to the jury for a determination of whether defendant's failure to report the defects to NCNB constituted a substantial breach of contract.

"It is well settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach. . . ." [Citations omitted.] An intended beneficiary, despite a lack of privity, may sue on the contract, either for its performance or damages.

Howell v. Fisher, 49 N.C. App. 488, 493, 272 S.E. 2d 19, 23 (1980). The test, then, in third-party beneficiary cases, is whether the parties to the contract intended to confer a benefit directly upon the person so claiming, or whether the benefit to the claimant was merely incidental. *Vogel v. Supply Company*, 277

Alva v. Cloninger

N.C. 119, 128, 177 S.E. 2d 273, 279 (1970); Restatement (Second) of Contracts §133 (1973).

The American Law Institute's Restatement of Contracts provides a convenient framework for analysis. Third-party beneficiaries are divided into three groups: *donee* beneficiaries, where it appears that the "purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary"; *creditor* beneficiaries, where "no purpose to make a gift appears" and "performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary"; and *incidental* beneficiaries, where the facts do not appear to support inclusion in either of the above categories. Restatement of Contracts, §133 (1932). While duties owed to donee beneficiaries and creditor beneficiaries are enforceable by them, Restatement of Contracts §§135, 136, a promise of incidental benefit does not have the same effect. "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." Restatement of Contracts, §147.

277 N.C. at 127, 177 S.E. 2d at 278. "[T]he law in this State as to *direct* third-party beneficiaries is synonymous with the Restatement categories of donee and creditor beneficiaries." (Citations omitted.) 277 N.C. at 127, 177 S.E. 2d at 278.

Plaintiffs fail to demonstrate that they were either "donee" or "creditor" beneficiaries. The appraisal was requested by NCNB to assist NCNB in processing the plaintiffs' loan application. It is important to note that NCNB considers several other factors (for example, credit standing and income) in processing loan applications. So, while it is clear that plaintiffs did stand to benefit from a favorable appraisal to the extent their loan application hinged on the appraisal, such benefit was merely incidental to the purpose of the agreement. Significantly, the defendant was not instructed by NCNB to provide plaintiffs with a copy of the appraisal report, and NCNB did not furnish plaintiffs with a copy. As pointed out above, the mere fact that a third person may receive benefits from a contract between two parties, or suffer damage by reason of a breach thereof, is insufficient to allow the third party to sue for a breach of contract as a third-party beneficiary. We hold, as did this court in

Alva v. Cloninger

Howell v. Fisher, that the plaintiffs' evidence did not establish a claim as "intended beneficiaries . . . for there is no recital that the contract was entered into for their direct benefit." (Citations omitted.) 49 N.C. App. at 493, 272 S.E. 2d at 23.

[2] Plaintiffs' alternative theory — that the trial court erred in directing a verdict for defendant on plaintiffs' tort claim at the close of plaintiffs' evidence — finds support in our case law. First, it is clear as a general matter, that an inference of negligence based on direct or circumstantial evidence may be sufficiently strong to take a case to the jury. See *Lassiter v. Williams*, 272 N.C. 473, 158 S.E. 2d 593 (1968). "[P]laintiff[s] need not directly prove negligence, but must prove facts from which the jury would be warranted in inferring it." *Redding v. Woolworth Co.*, 9 N.C. App. 406, 408, 176 S.E. 2d 383, 384-85 (1970); *appeal after remand*, 14 N.C. App. 12, 187 S.E. 2d 445 (1972). Indeed, "[o]n a motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true, and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence." *King v. Bonardi*, 267 N.C. 221, 224, 148 S.E. 2d 32, 35 (1966).

Second, and more particularly, "[a] nonsuit on the issue of negligence should not be allowed unless the evidence is free of material conflict, and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of defendant, or that his negligence was not the proximate cause of the injury." *Price v. Miller*, 271 N.C. 690, 693, 157 S.E. 2d 347, 349-50 (1967). A directed verdict is seldom appropriate in a negligence case.

Plaintiff Juan Alva's testimony that he discovered numerous defects almost immediately upon moving into the house, coupled with the expert opinion testimony that such defects existed at the time of the appraisal is sufficient to support, but not compel, a jury's finding that the defects did exist when defendant inspected the house. Additionally, plaintiffs produced expert testimony that an appraiser using due care would have discovered and disclosed such defects. We think the evidence presented at trial was sufficient to permit a reasonable inference of negligence, and therefore the case should have been submitted to the jury notwithstanding the lack of privity.

Alva v. Cloninger

The absence of contractual privity between plaintiffs and defendant is not a bar to plaintiffs recovery in tort. *See* Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 231 (1966). "[S]ound reason dictates that negligence liability be imposed, in appropriate circumstances, to protect the foreseeable interests of third parties not in privity of contract," *Howell v. Fisher*, 49 N.C. App. at 493, 272 S.E. 2d at 23, and therefore, it has long been established that negligent performance of a contract may give rise to an action in tort. "The parties to a contract impose upon themselves the obligation to perform it; the law imposes upon each of them the obligation to perform it with ordinary care and they may not substitute a contractual standard for this obligation." *Toone v. Adams*, 262 N.C. 403, 407, 137 S.E. 2d 132, 135 (1964). *See also* Prosser, *Handbook of the Law of Torts* § 93, at 622 (4th ed. 1971).

In several recent cases, this Court has held that a third party, not in privity of contract with a professional person, may recover for negligence which proximately causes a foreseeable economic injury to him. *Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 268 S.E. 2d 12 (1980) (condominium owners may recover for an architect's negligent design of a water pipe system); *Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E. 2d 313, *discretionary review denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980) (equipment lessor may recover for a lawyer's negligent failure to discover the existence of a lien on property used as collateral in a leasing agreement); *Browning v. Levien & Co.*, 44 N.C. App. 701, 262 S.E. 2d 355, *discretionary review denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980) (builders may recover from an architectural firm for negligent overcertification to the construction lender of the amount of work performed by a contractor) [*see also Kornitz v. Earling & Hiller, Inc.*, 49 Wis. 2d 97, 181 N.W. 2d 403 (1970)]; *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50, *discretionary review denied*, 298 N.C. 296, 259 S.E. 2d 301 (1979) (a contractor may recover for an architect's negligence in approving defective materials and workmanship).

49 N.C. App. at 494, 272 S.E. 2d at 23-24.

In this case, there was evidence from which the jury could have concluded that defendant should have reasonably fore-

Alva v. Cloninger

seen and expected that plaintiffs would rely on the appraisal report. For example, plaintiffs were named as "Borrowers" on defendant's work-order; plaintiffs paid the fee for defendant's services. By way of further example, defendant had transacted enough similar business with NCNB — 20 to 25 appraisals per month — that he should have been aware of the importance of his appraisals to borrowers and the reliance that borrowers would place thereon. *See Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580, *discretionary review denied*, 298 N.C. 295, 259 S.E. 2d 911 (1979) (soil testing engineers were held liable for damages to third-party contractors who, in submitting their bids, relied on the reports of the engineers, which negligently misrepresented the subsurface soil conditions).

The Restatement of Torts 2d, §552 (1977) provides that:

[o]ne who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The evidence established *prima facie* that plaintiffs' reliance upon the appraisal was, or should reasonably have been, expected by defendant. The evidence also warrants an inference that plaintiffs actually relied on defendant's appraisal report to NCNB and that defendant's failure to discover and disclose the alleged defects in the house was a proximate cause of plaintiffs' injury. Dr. Alva testified that the contract to purchase the house was conditioned upon his obtaining financing. The contract to purchase specifically stated "[i]n the event [plaintiffs, after exerting their best efforts to obtain financing, were unable to do so,] this contract shall be null and void." Dr. Alva also testified that he understood the loan was conditioned upon the appraisal and "assumed everything was all right when the loan was approved." Dr. Alva's assumption as to the import of the appraisal was substantiated by the testimony of witness McGhee, the lending officer, who said "[e]ither the repair work had to be done or we would have had to decline the loan application."

Alva v. Cloninger

Because the evidence of causation was sufficient, when viewed in the light most favorable to the plaintiff, to support a verdict in plaintiffs' favor, the court's directed verdict for defendant was error. See *Young v. Barrier*, 268 N.C. 406, 150 S.E. 2d 734 (1966).

Plaintiffs next contend that the court erred by excluding testimony from Wallace B. Kaufman, an expert real estate appraiser, who was prepared to establish an appraiser's standard of care and testify about the duties of a competent appraiser. Because we reverse on other grounds, and because the record fails to show what Kaufman's answer would have been had he been permitted to testify, no prejudice resulted from the trial court's decision to sustain the objection. Nevertheless, because expert opinion is likely again to be proffered at the retrial, we discuss this and plaintiffs' remaining assignments of error.

[3] Ordinarily, in determining the admissibility of expert testimony, "the only question is whether the particular matter under investigation is one on which the witness can be helpful to the jury because of his superior knowledge." 1 Stansbury, North Carolina Evidence, §134 (2d ed. Brandis rev. 1973). Consequently, in response to properly phrased questions, an expert should be allowed to assist the jury in determining the duties of a competent appraiser. *Alley v. Pipe Co.*, 159 N.C. 327, 74 S.E. 885 (1912). In *Alley*, the plaintiff, a pipemolder in defendant's foundry, was injured by the explosion of a core, which caused a stream of molten iron from the arbor, to strike plaintiff's foot, set his trousers afire, and seriously burn him. The core had been made by a core-maker named Nance. Three witnesses, found by the court to be experts, declared that Nance was an incompetent core-maker. The *Alley* court held: "[w]e think it was proper to admit the opinion of experts upon that disputed question. . . ." 159 N.C. at 330, 74 S.E. at 886. The holding in *Alley* seems applicable to the case *sub judice*.

Citing exceptions numbers seven, eight, and nine, plaintiffs also argue that the court should have allowed testimony regarding the relations between plaintiffs, NCNB and defendant. They contend that such evidence was relevant to establish plaintiffs' status as third-party beneficiaries and to establish their foreseeable reliance. Again, plaintiffs fail to show what the answer would have been if the witness had been allowed to

State v. Williams

testify. Moreover, we have reviewed each question to which exception was taken in the context in which the questions were asked and find each question to be narrow in scope and properly sustained. The exclusion of testimony on the narrow questions asked was without prejudice.

Plaintiffs finally argue that the court erred in excluding testimony which they contend was relevant on the issue of damages, regarding the cost of repairing the defects. Although we think the correct measure of damages is "decreased market value" — that is, the difference in market value of what defendant certified plaintiffs were getting and what they actually got — testimony with regard to the actual cost of repair is some evidence — though not controlling — of diminished value. *See generally* Dobbs, Remedies §12.21 (1976); and 22 Am. Jur. 2d, *Damages*, §140 (1965).

The court erred in directing a verdict for defendant on plaintiffs' tort claim. Accordingly, we

Reverse.

Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. GEORGE WILLIAMS

No. 804SC843

(Filed 5 May 1981)

1. Criminal Law § 91.6— denial of continuance to obtain transcript

In this fourth trial of defendant for misdemeanor larceny after three previous trials had ended in mistrials, the trial court did not abuse its discretion in the denial of defendant's motion for a continuance so that he could obtain a transcript of the third trial to aid in impeaching the credibility of the State's witnesses where defendant failed to show the existence of any inconsistency between the testimony of the witnesses in the third and fourth trials; defense counsel had a complete transcript of the first trial, the only proceeding in which he did not represent defendant; the three persons who testified for the State at the fourth trial presented the case in chief against defendant at all of the trials; and defense counsel, due to his participation in two of the previous trials, had more than an adequate opportunity to acquaint himself with the content of their eyewitness testimony to an extent whereby he could easily have revealed any discrepancies which might have appeared therein during the course of the fourth trial.

State v. Williams

2. Constitutional Law § 34; Criminal Law § 26.8— double jeopardy — fourth trial after three mistrials

Defendant's constitutional protection against double jeopardy was not violated by his fourth trial for larceny after a prior mistrial for juror misconduct and two prior mistrials for failure of the jury to agree on a verdict where all four trials took place in less than a year, the three mistrials were declared for sufficient and proper reasons, and defendant did not take exception to any of the mistrials.

3. Criminal Law § 112.6; Larceny § 8.1; Public Officers § 11—larceny trial of deputy sheriff — instructions on public authority defense

In this prosecution of a deputy sheriff for larceny of property from a hardware store, the trial court adequately instructed the jury on defendant's defense that he was acting within his public authority when he took the items from the store.

APPEAL by defendant from *Fountain, Judge*. Judgments entered 10 April 1980 in Superior Court, ONSLOW County. Heard in the Court of Appeals 29 January 1981.

Defendant was convicted of two counts of misdemeanor larceny, pursuant to G.S. 14-72, and judgment was entered imposing concurrent jail sentences of eight months.

Defendant was first tried and convicted in the Duplin County District Court on 6 June 1979. Defendant appealed to the Duplin County Superior Court where he was tried on 13 August 1979. That proceeding concluded with a mistrial on 17 August 1979 due to the misconduct of several jurors. The case was then transferred to Onslow County Superior Court for another trial on 27 November 1979. This trial also ended in a mistrial because the jury could not reach a unanimous verdict. Another mistrial had to be declared in the third trial on 26 March 1980 because the jury could not agree on a verdict. No objection was made or exception taken to the entry of the three mistrials. Before the fourth trial of the matter began, defendant moved for a continuance and a dismissal on double jeopardy grounds. Judge Fountain denied the motions, and defendant was convicted of the charges on 10 April 1980.

The State's evidence showed that defendant, a deputy sheriff, went to Whaley's Furniture Store in Kenansville, North Carolina in the daytime on two occasions in May 1979 and stole a power booster and some brackets worth \$41.55. He was dressed in his official uniform and arrived at the store in a marked patrol car each time. Defendant was later confronted with the

State v. Williams

thefts by an employee of the store which prompted him to tender some money for the items. He then signed a receipt which stated: "May 9, 1979, George Williams - one radio power booster \$39.95, \$1.60 tax, total \$41.55." The receipt was marked "paid" in the amount of \$25.00 and noted a balance of \$16.55 due.

Defendant's only evidence consisted of the testimony of R.J. Whaley, the owner of the store. He testified that he saw defendant on 10 May 1979. Defendant told Whaley that he had taken the items as part of an independent undercover investigation:

Well, he said he had an informer that informed him somebody was stealing stuff out of my store and saw a little short black man come out of the back end of the store, and he was sort of doing some undercover work. Well, he sort of wanted to give it [the power booster] back to me and I told him I didn't know what to do about it then.

.

He said he had heard that Boo Boo [an employee] had been stealing from me. [H]e was checking Boo Boo out. And I never give him [defendant] any authority whatsoever. Boo Boo takes my bank deposit to the bank; he runs my cash register, and I trust him thoroughly.

Attorney General Edmisten, by Associate Attorney James W. Lea, for the State.

Irving Joyner, for defendant appellant.

VAUGHN, Judge.

Three issues are presented: (1) whether the trial judge erred in denying defense counsel's motion for a continuance at the outset of the fourth trial; (2) whether the judge was required to dismiss the charges on double jeopardy grounds since defendant had already been tried three times with each proceeding resulting in a mistrial; and (3) whether the judge erred in failing to instruct the jury that the State had the burden of proving that the taking by defendant was not done in the lawful exercise of public authority. We disagree with defendant's contentions and hold that the court below acted properly in each instance.

State v. Williams

[1] It is axiomatic that a motion for a continuance is addressed to the sound discretion of the trial court and that its ruling thereon will not be disturbed absent an abuse of discretion. *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980); *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Raynor*, 45 N.C. App. 181, 262 S.E. 2d 712 (1980). Nevertheless, where a motion for a continuance raises a constitutional issue, the trial court's decision thereon involves a question of law, not fact, which may be reviewed by an examination of the circumstances of each case. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977); *State v. Huffman*, 38 N.C. App. 584, 248 S.E. 2d 407 (1978). Here, defendant contends that he needed the transcript from the third trial to impeach the credibility of the State's witnesses by "pointing out to the jury basic discrepancies in [their] testimony." It is true that the constitutional right of confrontation includes the right to face "the accusers and witnesses with other testimony," but the burden is on defendant to show a clear denial of this right. *State v. Garner*, 203 N.C. 361, 166 S.E. 180, 181 (1932). Defendant, however, only makes a bald assertion that his right to confront the State's witnesses was denied and does not specifically indicate in what way a transcript of the witnesses' prior testimony in the March trial would have enabled him to discredit their testimony in the April trial more effectively. Moreover, he does not direct our attention, either by means of the record or the brief, to the existence of any inconsistency between the witnesses' statements in April with those made at the former trial.

In these circumstances, we hold that defendant has not performed the threshold task of demonstrating an error in the denial of the motion for continuance which prejudiced his case. See *State v. Hartman*, 49 N.C. App. 83, 270 S.E. 2d 609 (1980); *State v. Winston*, 47 N.C. App. 363, 267 S.E. 2d 43 (1980). Defense counsel had a complete transcript of the first trial in the Duplin County Superior Court, the only proceeding in which he did not represent defendant. The three persons who testified for the State at the April trial presented the case in chief against defendant at all of the trials and defense counsel, due to his participation in two of the previous trials, had more than an adequate opportunity to acquaint himself with the content of their eyewitness testimony to an extent whereby he could easily reveal any discrepancies which might appear therein during

State v. Williams

the course of the April trial. *See also State v. Preston*, 9 N.C. App. 71, 77, 175 S.E. 2d 705, 708 (1970). In sum, we are unable to say, as a matter of law, that the trial judge abused his discretion in denying the motion.

[2] Defendant contends that the State's persistence in seeking a conviction after three previous mistrials amounted to a deprivation of his constitutional protection against double jeopardy. We disagree.

It is a basic precept of the common law, guaranteed by the Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense. U.S. Const. Amend V; N.C. Const. Art. 1, § 19; *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Cooley*, 47 N.C. App. 376, 268 S.E. 2d 87, *appeal dismissed*, 301 N.C. 96, 273 S.E. 2d 442 (1980).¹ A defendant's cherished right to have his liberty or life legally imperilled only once for a criminal charge does not, however, necessarily preclude retrial when previous proceedings against him have failed to conclude in a judgment of either conviction or acquittal. *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). *See generally* Annot., 50 L. Ed. 2d 830, 841-42 (1978); 21 Am. Jur. 2d *Criminal Law* § 194, at 246 (1965). Indeed, the long-standing rule in this country is that an order of mistrial, which is declared for a "manifest necessity" or to serve the "ends of public justice," will not ordinarily cause a subsequent conviction after retrial to be susceptible to a plea of former jeopardy. *United States v. Perez*, 22 U.S. 579, 6 L. Ed. 165 (1824)²; *State v. Shuler*, 293 N.C. 34, 235 S.E. 2d 226 (1977), *aff'd sub nom. Shuler v. Garrison*, 631 F. 2d 270 (4th Cir. 1980); *State v. Washington*, 90 N.C. 664, 666 (1884).

1. The double jeopardy clause of the Fifth Amendment of the United States Constitution is made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). Justice Sharp, however, correctly noted that the federal provision added nothing to our law since North Carolina has always recognized the constitutional concept as a "sacred principle of the common law." *State v. Battle*, 279 N.C. 484, 486, 183 S.E. 2d 641, 643 (1971); *see State v. Davis*, 80 N.C. 384, 387 (1879).

2. The reports of the United States Supreme Court are replete with cases espousing the constitutional proverb of *United States v. Perez*, *supra*, that a defendant may be retried consistently with the Fifth Amendment, whenever a mistrial has been declared to meet the ends of substantial justice. *See, e.g., Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); *United States v. Tateo*, 377 U.S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964).

State v. Williams

It is, nevertheless, equally well established that the Fifth Amendment can, in overbearing situations, provide recourse for a defendant who has been harassed by multiple retrials.

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, 204 (1957); see *Swisher v. Brady*, 438 U.S. 204, 216, 98 S. Ct. 2699, 2706-07, 57 L. Ed. 2d 705, 715-16 (1978); *United States v. Dinitz*, 424 U.S. 600, 611, 96 S. Ct. 1075, 1081, 47 L. Ed. 2d 267, 276 (1976). When oppressive practices by the State are absent, however, the public's interest in a final adjudication of guilt or innocence outweighs the defendant's right to be secure from further judicial scrutiny after the declaration of a mistrial. See 49 N.C. L. Rev. 782, 785-88 (1971).

In *Wade v. Hunter*, the Supreme Court recognized that a "rigid formula" would be inappropriate in such cases and, in effect, adopted a "balancing" approach:

There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978 (1949); accord, *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L.

State v. Williams

Ed. 2d 717 (1978); *Green v. United States*, *supra* (Frankfurter, J. dissenting). We note that our own Supreme Court also indicated its sensitivity to this delicate interaction of the rights of the accused and the interests of society long ago:

The power confided to the judge of ordering a mistrial, even in case the charge is for a capital felony, with the restraints attending its exercise, is sufficiently stringent to afford every reasonable protection to the accused and secure a fair and impartial trial; and while he can rightfully demand no more, the protection of the public from crime, by the punishment of the offender, will admit of nothing less.

State v. Washington, *supra*, 90 N.C. at 666; *accord*, *State v. Cooley*, *supra*, 47 N.C. App. at 384, 268 S.E. 2d at 92.

It is, therefore, clear that each double jeopardy claim must be weighed according to the particular facts of the case. *See Whitfield v. Warden of Maryland House of Correction*, 486 F. 2d 1118, 1121-22 (4th Cir. 1973), *cert. denied*, 419 U.S. 876, 42 L. Ed. 2d 116 (1974). For this reason, the United States Supreme Court has declined to fix a specific limit to the number of times a defendant may be retried after a mistrial has been properly declared. *See Gori v. United States*, 367 U.S. 364, 369, 81 S. Ct. 1523, 1526, 6 L. Ed. 2d 901, 905 (1961), where the Court states, "Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment. . . ." Thus, no federal or state legal precedent compels the conclusion in the instant case that four criminal trials are definitely one or two too many to be sustained under the constitutional principle of double jeopardy, and we decline to so hold. We are, however, aware of defendant's right to be safe from successive prosecutions at some reasonable time, as well as his right to be protected from prosecutorial efforts to shop around for a convicting jury. Nevertheless, we are not convinced that the circumstances of this case are so extreme as to warrant reversal of defendant's conviction on the ground of double jeopardy based *solely* on the number of trials. Here, the State acted expeditiously and fairly to achieve a final resolution, and all four trials took place in less than a year. Moreover, the mistrials were declared in each instance for a well-accepted reason "caused by operation of law, by an event which comes like an interposition

State v. Williams

of Providence — which neither party has contrived to bring about, and which neither has the power to hasten or retard.” *State v. Tilletson*, 52 N.C. 114, 116 (1859).

Furthermore, there is substantial authority which supports the conclusion that it was not unconstitutional to retry defendant three times. For instance, in *Hopt v. Utah*, the defendant was retried three times following the reversals of his convictions. 104 U.S. 631, 26 L. Ed. 873 (1882); 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884); 114 U.S. 488, 5 S. Ct. 972, 29 L. Ed. 183 (1885); 120 U.S. 430 7 S. Ct. 614, 30 L. Ed. 708 (1887). In *United States v. Persico*, the defendants were tried five times following two appellate reversals and two mistrials. 425 F. 2d 1375 (2d Cir.), *cert. denied*, 400 U.S. 869, 27 L. Ed. 2d 108 (1970). There are also several cases upholding a third trial of defendant where the jury has been unable to agree on a verdict in two previous proceedings. *United States v. Gunter*, 546 F. 2d 861 (10th Cir. 1976), *cert. denied*, 431 U.S. 920, 53 L. Ed. 2d 232 (1977); *United States v. Castellanos*, 478 F. 2d 749 (2d Cir. 1973), *reversing*, 349 F. Supp. 720 (E.D.N.Y. 1972); *Orvis v. State*, 237 Ga. 6, 226 S.E. 2d 570 (1976).

Defendant, nonetheless, seeks reversal of his convictions based upon two federal cases: *Carsey v. United States*, 392 F. 2d 810 (D.C. Cir. 1967), and *Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971). In *Carsey*, there had been three mistrials. The first two mistrials were declared when the jury was unable to reach a verdict, but the third mistrial was ordered by the trial judge because defense counsel mentioned the prior mistrials in his closing argument to the jury. On appeal, the majority held that the judge had abused his discretion in declaring the third mistrial since there was no “imperious necessity” for granting it. 392 F. 2d at 812. *See also* U.S. ex rel. *Webb v. Court of Common Pleas*, 516 F. 2d 1034 (3rd Cir. 1975). That decision, therefore, was not grounded upon the *number* of times the defendant had been tried. It merely affirms the general proposition that a defendant’s right to have his trial completed by the particular tribunal summoned to sit in judgment on him should be subordinated to the public’s interest in a final adjudication of guilt or innocence only “when there is an imperious necessity to do so.” *Downum v. United States*, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). In the case before us, the three mistrials (for juror misconduct and failure of the jury to agree on a verdict)

State v. Williams

were declared for sufficient and proper reasons, and defendant did not take exception to any of them.

In *Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971), a federal trial judge set free two felons whose convictions for robbery with firearms had been affirmed by this Court in *State v. Preston*, 9 N.C. App. 71, 175 S.E. 2d 705, *cert. denied*, 277 N.C. 116 (1970). In that case, four earlier trials had resulted in mistrials because of deadlocked juries. There was no suggestion that any of the mistrials were improperly declared — such as that the judge acted too quickly. The federal trial judge, however, was of the opinion that “jeopardy attached” when the defendants were placed on trial the *fifth* time and, notwithstanding their convictions at *that* trial, ordered their discharge. Although there was no appellate review of his decision, it was obviously wrong. Among other things, it ignores the fundamental principle that a “classic example” of “manifest necessity” for the declaration of a mistrial is the discharge of a genuinely deadlocked jury, *Downum v. United States*, *supra*, and that when the “manifest necessity” test is met, defendant’s right to be secure from further prosecution is outweighed by the public interest in having a final determination of guilt or innocence. *United States v. Perez*, *supra*. Although the decision to free the prisoners in *Preston v. Blackledge*, *supra*, was not reviewed on appeal, it has been collaterally discredited. *United States v. Castellanos*, *supra*, 478 F. 2d n. 2 at 752.

[3] Defendant finally argues that the court failed to place on the State the burden of proving that he was not acting within his public authority when he took the items from the store. The contention is patently without merit. The judge clearly instructed the jury that the State had the burden of proving every element of the offense of larceny, to wit, that defendant took and carried away the personal property of another with the intent to deprive the owner of its use permanently and convert it to his own use. Then the judge explained to the jury that defendant’s criminal intent would be negated, and the taking therefore lawful, if they believed defendant was acting within the scope of his public authority in removing the items.

Of course, if the defendant had no criminal intent, that is, no intent to convert the property to his own use or to the use of someone else and to permanently deprive the true

Allison v. Allison

owner of its use, obviously he would not be guilty of anything.

Or, to put it another way, if he had the honest belief that he had a right to take the merchandise referred to in the evidence from the store of Mr. Whaley and that he considered he was performing such act in the course of his duty as a deputy sheriff and if he actually took the property and carried it away but without the intent to deprive the true owner of its use or without the intent to convert it to his own use but for the purpose of bearing out some other thief or for any other purpose that did not involve the criminal intent on his part, then he would not be guilty of the offense charged, either of the offenses charged.

Viewing these instructions as a whole, we hold that the judge adequately explained the law arising from the evidence, G.S. 15A-1232, and that defendant was not entitled to a more specific declaration of his public authority defense absent a special request.

We have carefully reviewed all of defendant's assignments of error, and we conclude that he received a fair trial free from error or prejudice.

No error.

Chief Judge MORRIS and Judge BECTON concur.

FRANCES M. ALLISON v. JOE LEE ALLISON

No. 8029DC460

(Filed 5 May 1981)

1. Divorce and Alimony §§ 19.5, 20.2— consent order — whether payments are alimony or property settlement

In determining whether a provision in a consent judgment is for alimony alone and thus severable from the remaining provisions and terminable upon the wife's remarriage, or whether the provision for alimony and the provisions for division of property constitute reciprocal consideration so that they are not separable and may not be changed without the consent of both parties, a consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties.

Allison v. Allison

2. Divorce and Alimony §§ 16.10, 19.5— consent order — determination that required payments were part of property settlement — supporting evidence

The evidence supported the trial court's determination that defendant's obligation under a consent judgment to pay plaintiff \$17,640.00 in 126 monthly installments of \$140.00 each did not constitute alimony but was a part of a property settlement pursuant to which plaintiff released rights in joint property of the parties as part of the consideration of the periodic payments and that the periodic payments thus did not terminate under G.S. 50-16.9(b) upon the remarriage of plaintiff, notwithstanding the consent order found that defendant abandoned plaintiff and ordered that the payments were to be made "as alimony," where (1) the order referred to the sum in question as "a gross settlement payment"; (2) the order found that the payment was to be "in lieu of all claims for alimony"; (3) the order found the payment to be fair and reasonable under the circumstances then existing between the parties "and contemplated in the future"; (4) the order contained no finding that the wife was a dependent spouse or that the husband was a supporting spouse; and (5) plaintiff testified that realty held jointly by the parties during their marriage (not including improvements thereon) originated entirely with her mother, the parties agreed that defendant would receive 20 acres of the realty free of indebtedness and that plaintiff would receive the remaining 60 acres which contained the homeplace constructed by the parties, and the tract received by plaintiff was subject to an indebtedness of approximately \$40,000.00 which plaintiff was to pay.

APPEAL by defendant from *Guice, Judge*. Order entered 1 February 1980 in District Court, McDOWELL County. Heard in the Court of Appeals 6 November 1980.

Plaintiff moved that defendant be adjudged in contempt for failure to comply with the provision of a 28 October 1976 consent order requiring that he pay plaintiff \$17,640.00 in 126 monthly installments of \$140.00 each. The order recited that

[d]efendant has agreed to pay, and plaintiff has agreed to accept, in lieu of all claims ... for alimony, and all other matters arising out of the marriage ..., the sum of \$17,640.00 in monthly installments ..., which ... the court finds to be fair and reasonable under the circumstances now existing between the parties and contemplated in the future.

It ordered:

1. That the execution of cross deeds by the parties, contemporaneously with the entry of this order, constitutes the final settlement of all matters and things in controversy between the parties.

Allison v. Allison

2. That defendant shall pay to the plaintiff as alimony a gross settlement payment of \$17,640.00, which sum shall be paid by defendant to plaintiff in 126 monthly installments of \$140.00 each, the first such monthly installment to be due and payable on the 1st day of November, 1976, with subsequent installments to be due and payable on the 1st day of each succeeding month until all 126 installments have been paid.

3. Defendant shall pay all mortgage installments due prior to November 1, 1976 Plaintiff shall be responsible for all installments due . . . on and after November 1, 1976.

Plaintiff remarried in April 1979. Defendant made all payments due under the order through April 1979, but made no payments thereafter. Defendant moved that plaintiff's motion that he be adjudged in contempt be dismissed "for the reason that Plaintiff's right to alimony had terminated on her remarriage by the provisions of G.S. [50-16.9(b)]." The motion was denied.

The trial court concluded:

1. That said Consent Order dated October 28, 1976, contemplated a complete financial and property settlement between the Plaintiff and the Defendant in lieu of all claims by the Plaintiff against the Defendant for alimony, and all other matters arising out of the marriage between said parties and was not an Order or Judgment for the payment of alimony alone.

2. That said Order is still valid and subsisting and there remains unpaid thereon a balance of Thirteen Thousand Four Hundred Forty Dollars (\$13,440.00)

It ordered:

1. That the Plaintiff's Motion that the Defendant be adjudged in contempt of this Court for his willful failure to comply with the terms and provisions of said Consent Order dated October 28, 1976, is denied.

2. That said Consent Order dated October 28, 1976, continues to be a valid and enforceable Order in favor of the Plaintiff for the balance due thereunder in the amount of

Allison v. Allison

Thirteen Thousand Four Hundred and Forty Dollars (\$13,440.00).

From this order, defendant appeals.

Dameron and Burgin, by E.P. Dameron, for plaintiff-appellee.

Carnes and Little, P.A., by Everette C. Carnes, for defendant-appellant.

WHICHARD, Judge.

Defendant contends the court erred in ordering that the consent order continues to be valid and enforceable in favor of plaintiff with a balance due of \$13,440.00, because the court thereby determined questions not presented by plaintiff's motion. The court's findings of fact, however, indicate that defendant contended at the hearing that he was relieved, under G.S. 50-16.9(b), from making the payments by virtue of plaintiff's remarriage. By so contending, defendant himself raised the issue of the continuing validity and enforceability of the order. "[I]t is well settled that where the facts . . . do not entitle the party to the only relief prayed but do give him a right to other relief, he may recover the judgment to which he is entitled." *Bruton v. Bland*, 260 N.C. 429, 430, 132 S.E. 2d 910, 911 (1963). Further, "G.S. 1A-1, Rule 54(c) contemplates judgments granting the relief to which the party in whose favor they are rendered is entitled without regard to whether such relief has been demanded in that party's pleadings." *Nugent v. Beckham*, 37 N.C. App. 557, 561, 246 S.E. 2d 541, 545 (1978). We thus find no impropriety in the trial court's grant of the declaratory relief in question, if the facts entitle plaintiff to such relief.

Defendant further contends, however, that plaintiff was not entitled to such relief in that the payments ordered were alimony and thus terminated upon remarriage of the wife. Plaintiff responds that the order was not merely to pay alimony but was rather an aspect of a property settlement in which the plaintiff released rights in joint property of the spouses as part of the consideration for the periodic payments.

If the payments were alimony, defendant clearly was relieved of the obligation to make payments which accrued subsequent to plaintiff's remarriage. "If a dependent spouse who is

Allison v. Allison

receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate." G.S. 50-16.9(b). Defendant was not thus relieved, however, if the payments ordered were part of a property settlement pursuant to which plaintiff released rights in the joint property of the spouses as part of the consideration for the periodic payments. As stated in 2 Lee, North Carolina Family Law § 154 at 259 (1980):

Where a valid property settlement has been entered into by the parties and it is shown that such was intended as a release of all claims against each other, including the wife's claim for alimony or support, the courts generally hold that such is final and will not be disturbed because of the remarriage of the wife.

This principle is also set forth in 24 Am. Jur. 2d, Divorce and Separation § 912 at 1037-1038 (1966), as follows:

If the contract is a property settlement it may well be that the periodic payments are a consideration for the wife's release of her rights in the joint property of the spouses or of her equities or legal rights in the husband's property, in place of or in addition to a provision for her support, in which event it is natural to assume that the wife's remarriage was not intended to have any effect upon the husband's liability. It is accordingly held that in the absence of an expressed intention to the contrary a husband's obligation to pay money to his wife, where it is an integral part of a property settlement, survives her remarriage, and that a contract for the payment of a lump sum in lieu of dower or property rights survives the wife's remarriage, even though the lump sum is payable in installments.

[1] In determining whether a provision in a consent judgment is for alimony alone and thus severable from the remaining provisions and terminable upon the wife's remarriage, or whether the provision for alimony and the provisions for division of property constitute reciprocal consideration, so that "they are not separable and may not be changed without the consent of both parties," *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E. 2d 240, 243 (1964), "[a] consent judgment must be construed in the same manner as a contract to ascertain the intent of the

Allison v. Allison

parties." *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E. 2d 456, 457 (1975). Our Supreme Court has stated in *White v. White*, 296 N.C. 661, 667-668, 252 S.E. 2d 698, 702 (1979):

The answer depends on the construction of the consent judgment as a contract between the parties. "The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed." (Citation omitted.)

If the consent judgment "is clear and unambiguous and leaves no room for construction," its construction is a matter of law and must be "as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms." *Martin*, 26 N.C. App. at 508, 216 S.E. 2d at 458. Where ambiguities appear, however, the intentions of the parties must be determined from evidence of the facts and circumstances surrounding entry of the consent judgment, just as the intentions of the parties to an ambiguous written contract must be determined from the surrounding circumstances. *White*, 296 N.C. at 667-668, 252 S.E. 2d at 702.

Defendant contends the result here should be governed by this court's decision in *Martin*, 26 N.C. App. 506, 216 S.E. 2d 456. We disagree. The court in *Martin* found the language in the consent judgment there to be "clear and unambiguous and [to leave] no room for construction." *Martin*, 26 N.C. App. at 508, 216 S.E. 2d at 458. The language in the consent order here is by no means clear and unambiguous. On the contrary, the order is a model of confusion rather than clarity. It contains contradictory provisions concerning the payments at issue in that it first states that they are "in lieu of all claims by plaintiff . . . for alimony" and then orders that the payments are to be made "as alimony." Further, the same provision which orders the payments made "as alimony" also refers to them as "a gross settlement payment."

[W]here [an] entire contract is in writing and the intention of the parties is to be gathered from it, the effect of the instrument is a question of law, but if the terms of the agreement are equivocal or susceptible of explanation by extrinsic evidence the [trier of fact] may determine the

Allison v. Allison

meaning of the language employed.

Porter v. Construction Co., 195 N.C. 328, 330, 142 S.E. 27, 29 (1928). In contempt proceedings "[t]he judge is the trier of fact at the show cause hearing." G.S. 5A-23(d) (Supp. 1979). The trial court thus had to consider the order, together with the evidence of surrounding circumstances, to determine the intentions of the parties. The court's findings of fact are conclusive if supported by any competent evidence; and conclusions supported by such findings will be affirmed, even though there is evidence which might sustain facts to the contrary. *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967); *Church v. Church*, 27 N.C. App. 127, 218 S.E. 2d 223 cert. denied 288 N.C. 730, 220 S.E. 2d 350 (1975). We thus review the record here to determine whether "[t]he facts in this mixed question of law and fact are supported by the evidence" and whether "[t]he findings support the conclusion of law." *Highway Comm. v. Rankin*, 2 N.C. App. 452, 455, 163 S.E. 2d 302, 304 (1968).

[2] The court stated its interpretation of the consent order in its first conclusion of law, as follows:

1. That said Consent Order . . . contemplated a complete financial and property settlement between the Plaintiff and the Defendant in lieu of all claims by the Plaintiff against the Defendant for alimony, and all other matters arising out of the marriage between said parties and was not an Order or Judgment for the payment of alimony alone.

The following provisions and evidence support the court's interpretation:

First, the order refers to the sum in question as "a gross settlement payment." This language is subject to the interpretation that the payments were intended to represent something other than alimony.

Second, the order found as a fact that the payment was to be "*in lieu of* all claims for alimony, and all other matters arising out of the marriage." (Emphasis supplied.) The phrase "*in lieu of*" means "[i]nstead of; in place of; in substitution of." Black's Law Dictionary (5th ed. 1979). The use of this phrase also renders the order subject to the interpretation that the payment was not to be alimony, but something substituted in

Allison v. Allison

its place. Further, the use of the phrase "and all other matters arising out of the marriage" provides additional support for an interpretation that the intent was that the payment represent something other than alimony.

Third, the order found the payment "to be fair and reasonable under the circumstances now existing between the parties *and contemplated in the future*." (Emphasis supplied.) The use of the phrase "and contemplated in the future" provides still further basis for an interpretation that the intent was that the payment represent something other than alimony. If the payment was alimony, the sum would be modifiable in the future upon a showing of changed circumstances. G.S. 50-16.9. This would obviate the necessity of contemplating future circumstances at the time the consent order was entered. This language, too, is thus subject to an interpretation that the intent was to resolve all matters between the parties on a permanent basis rather than merely to provide for payment of alimony.

Fourth, the absence of certain language likewise subjects the order to an interpretation that the sum in question was something other than alimony. There was no finding that the wife was a "dependent spouse" or that the husband was a "supporting spouse." A spouse must be "dependent" to be entitled to receive alimony and must be "supporting" to be required to pay it. G.S. 50-16.2; *see also* G.S. 50-16.1. "The terms 'dependent spouse' and 'supporting spouse' are used throughout the [alimony] statute." 2 Lee, North Carolina Family Law, § 135, at 140 (1980). While a finding of dependency is not required where judgments ordering payment of alimony are entered by consent, *Cox v. Cox*, 36 N.C. App. 573, 245 S.E. 2d 94 (1978), the absence of such a finding was nevertheless a factor which the court could have considered in interpreting the inherently ambiguous consent order.

Fifth, the plaintiff's testimony at the hearing regarding the situation of the parties at the time the court entered the consent order provides further support for the interpretation that the parties intended a property settlement. The plaintiff testified that the real properties held jointly by the parties during their marriage (not including improvements thereon) originated entirely with her mother. The parties nevertheless agreed that defendant would receive 20 acres of the real property, free

Sugg v. Parrish

of indebtedness. They agreed that plaintiff would receive the remaining 60 acres which contained the homeplace constructed by the parties. This tract was subject to indebtedness of approximately \$40,000.00, which plaintiff was to pay. When considered together with the provisions of the consent order discussed above, plaintiff's evidence is subject to the interpretation that the payment in question was intended not as alimony, but as an equalizer in the settlement of the property interests of the parties.

Defendant contends the court's finding that defendant left the family home "under circumstances which constituted an abandonment of plaintiff by the defendant, for the purposes of supporting this order only," and its order that defendant pay the sum in question "as alimony," dictate the conclusion that the sum was indeed alimony. While these factors might have so convinced the court, we find ample support, both in the order and in the surrounding circumstances, for the interpretation that the payments were part of a complete property settlement rather than alimony. It follows that defendant's obligation did not terminate upon plaintiff's remarriage, and that his motion to dismiss at the close of plaintiff's evidence was properly denied.

The order appealed from is

Affirmed.

Judges HEDRICK and CLARK concur.

WILLIAM J. SUGG, CO-PARTNER AND AGENT OF LOUISE M. SUGG, HEIRS V. MAX PARRISH, MAX FUTRELL AND N.C. NEWMAN, CO-PARTNERS, TRADING AND DOING BUSINESS AS BIG THREE WAREHOUSE, GOLDSBORO, NORTH CAROLINA

No. 8011DC492

(Filed 5 May 1981)

1. Agriculture § 5- sale of tobacco by tenant – landlord's lien – no waiver or estoppel

In an action to recover one-half the total sum due for tobacco sold by plaintiff's tenant at defendants' warehouse, plaintiff was entitled to the sum

Sugg v. Parrish

claimed under the landlord's lien statute, G.S. 42-15, and plaintiff, as a matter of law, did not waive his lien nor was he estopped to assert it by his conduct in clothing his tenant with authority to make the sale by delivering his marketing card to the tenant and never contacting defendants with respect to division of the checks upon the completion of each sale, where the evidence permitted findings that one defendant had knowledge of plaintiff's superior claim, was requested by plaintiff not to make any disposition of the tenant's accustomed share pending further instructions from plaintiff, and nevertheless applied the proceeds to his own use or to that of the warehouse in disregard of plaintiff's superior lien rights.

2. Agriculture § 5— sale of tobacco by tenant – evidence properly excluded

In an action to recover one-half the total sum due for tobacco sold by plaintiff's tenant at defendants' warehouse, the trial court did not err in excluding testimony by plaintiff concerning transactions by the tenant at a warehouse other than defendants' during the year preceding that of the transactions in question, since the evidence had no bearing on the issue as to the existence of plaintiff's lien as landlord; there was no evidence tending to show that defendants had knowledge of or placed reliance on a course of dealing established between plaintiff, his tenant, and a warehouse other than defendants' during the preceding year; and the substance of the evidence which defendants attempted to elicit by questioning plaintiff was before the jury.

3. Agriculture § 5— tenant's sale of tobacco – landlord's lien – issue submitted to jury

In an action to recover one-half the total sum due for tobacco sold by plaintiff's tenant at defendants' warehouse where the evidence tended to show that the tenant had executed a note for the sum he owed plaintiff landlord and that plaintiff landlord had filed a claim against the tenant's estate for the amount of the note, there was no merit to defendants' contention that an issue arose as to whether plaintiff, by acceptance of the note, waived any statutory lien he might have, since the parties stipulated to the issues and defendants could not subsequently contend that a separate issue should have been submitted with regard to the note.

APPEAL by defendants from *Lyon, Judge*. Judgment entered 21 February 1980 in District Court, JOHNSTON County. Heard in the Court of Appeals 13 November 1980.

Plaintiff, for himself and as agent for his brother and sisters, filed this action against defendants, as partners in a tobacco warehouse, seeking to recover \$2,190.25 with interest from 3 October 1977. He alleged that defendants had paid him \$2,190.26, one-half the total sum due for tobacco which he sold at defendants' warehouse on 3 October 1977, but had not paid the balance of \$2,190.25.

Defendants admitted that one R.G. Williams sold tobacco

Sugg v. Parrish

with them on numerous occasions during 1977 using a marketing card issued in the name of plaintiff as "Executor." They alleged that Williams was plaintiff's tenant, and that the tenant represented that the sales proceeds were to be divided equally between him and plaintiff. On each occasion prior to the 3 October 1977 sale defendants disbursed the proceeds equally between plaintiff and his tenant; and plaintiff accepted his one-half share, thereby acquiescing in the disbursement procedure. Defendants also alleged that plaintiff was thereby estopped to claim the relief now requested.

As a further defense, defendants alleged that the procedure described is the "standard course [of] dealing used by the tobacco industry," and that it was known to and understood by plaintiff. They pled the course of dealing in bar of plaintiff's claim for relief. Finally, they alleged that plaintiff was merely seeking to collect a debt owed him by his tenant; and that recovery from defendants would result in "double recovery" to plaintiff and inure to the unjust enrichment of the tenant.

Plaintiff's evidence tended to show that in 1977 the tenant grew tobacco on plaintiff's land pursuant to agreement that plaintiff and tenant would share the net sales proceeds equally. Plaintiff furnished the land, fertilizer, herbicides and insecticides, while tenant provided the labor. Prior to the 3 October 1977 sale, the tenant had sold tobacco at defendants' warehouse on nine occasions. On each occasion the tenant sold under a marketing card issued to plaintiff as "Executor," which was given to tenant by plaintiff for use in selling the tobacco. Plaintiff was not present at the sales and had no communications with defendants concerning division of the proceeds. Subsequent to each sale defendants issued checks to plaintiff and the tenant in equal amounts. The tenant then brought the tobacco sales bills and the two checks to plaintiff to "settle up."

Prior to the 3 October 1977 sale, plaintiff had advanced \$2,500-\$3,000 to his tenant for harvesting the crops. The tenant also owed plaintiff approximately \$7,000 for other advancements connected with the farming operations.

Subsequent to the 3 October 1977 sale, defendant Parrish came to plaintiff's house, indicated to plaintiff that the tenant owed him (Parrish) money, and advised plaintiff that he had held the tenant's one-half of the proceeds on that account.

Sugg v. Parrish

Defendant Parrish told plaintiff, "Now, if this presents any problem to you or causes you any trouble, I will release the check to you." Plaintiff responded, "Just hold it and let me speak to [the tenant] and get some background and I will call you back." Plaintiff then talked to his tenant, and the tenant acknowledged that the warehouse had retained his check. When plaintiff called defendant Parrish to request that Parrish send him the tenant's check, however, Parrish declined; and none of the defendants ever tendered the check to him.

The tenant died in 1979. Prior to his death he had given plaintiff a note for the sum he owed plaintiff. Plaintiff had filed a claim against the tenant's estate for the sum due, but had not received any money as a result.

Defendants' evidence tended to show that defendant Parrish endorsed two notes executed by the tenant in the total sum of approximately \$8,700.00. The tenant defaulted, and Parrish had to pay the notes. Parrish therefore withheld the tenant's \$2,190.25 check. The tenant at some point endorsed the check over to Parrish, and Parrish deposited it in the warehouse account. Parrish testified that he "was not aware that the landlord had a lien against the crop for advances or rent in North Carolina."

Stipulated issues were submitted to and answered by the jury as follows:

1. Did the plaintiff have a landlord's lien on the crops of R.G. Williams, Jr. raised on plaintiff's lands during the crop year, 1977?

ANSWER: YES

2. If so, did the plaintiff, by his conduct, waive his landlord's lien?

ANSWER: NO

The court entered judgment, based on the verdict, in favor of plaintiff in the sum of \$2,190.25 with interest from 3 October 1977.

From this judgment, defendants appeal.

Ashley and Holland, by Wallace Ashley, Jr., for plaintiff appellee.

Sugg v. Parrish

Taylor, Warren, Kerr and Walker, by Robert D. Walker, Jr., for defendants appellants.

WHICHARD, Judge.

[1] Defendants assign error to the denial of their motion for a directed verdict. Plaintiff's claim to his tenant's agreed share of the sales proceeds derives from the landlord's lien statute, which provides, in pertinent part, as follows:

When lands are rented or leased by agreement, written or oral, for agricultural purposes, . . . unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, *and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops. . . .*

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

G.S. 42-15 (emphasis supplied). Plaintiff testified that he had made advancements to his tenant "in the neighborhood of \$10,000.00 for all financing in connection with the cultivation of crops." It is clear that at least \$2,500-\$3,000 of this amount related to the crop in question. Under the express provisions of G.S. 42-15, then, plaintiff had a lien on the crops. This lien continued until plaintiff was paid for these advancements, and it had preference over all other liens against the tenant or the tenant's assigns. Defendant Parrish testified: "I was not aware that the landlord had a lien against the crop for advances or rent in North Carolina." As Justice (later Chief Justice) Bobbitt noted in *Hall v. Odom*, 240 N.C. 66, 69, 81 S.E. 2d 129, 132 (1954), however: "The landlord's lien exists by virtue of the statute. . . .

Sugg v. Parrish

No written instrument is required or contemplated. The registration acts ... have no significance (Citation omitted.) *The statute itself gives notice to all the world of the law relative to a landlord's lien.*" (Emphasis supplied.) Thus, "[a] purchaser from the tenant, or an auction sales warehouse selling as his agent, is dealing with a crop with statutory notice of the lien outstanding thereon." *Id.* at 70, 81 S.E. 2d at 132.

Defendants contend, nevertheless, that as a matter of law plaintiff waived his lien or was estopped to assert it. They cite, as support for their contention, plaintiff's conduct in 1) clothing his tenant with authority to make the sales by delivering his marketing card to the tenant and 2) never contacting defendants with respect to division of the checks upon the completion of each sale. They rely on *Adams v. Warehouse*, 230 N.C. 704, 55 S.E. 2d 331 (1949).

The plaintiffs in *Adams*, like plaintiff here, made advancements to their tenant to enable the tenant to cultivate and harvest a crop. They too had given the tenant their marketing card. The tenant sold tobacco at defendants' warehouse, and defendants issued their check payable to plaintiffs and the tenant. The tenant cashed the check and applied a portion of the proceeds to payment on a mortgage note signed by him and his landlord. He had not accounted for the balance. The court held that the tenant's possession and production of plaintiffs' marketing card constituted authority for defendants to issue and deliver the check for the purchase price to the tenant; and that by their act of delivering the card to the tenant, plaintiffs consented to the payment to tenant as a matter of law.

It is true that plaintiff here also gave the tenant his marketing card. Here, however, before any check was issued to the tenant for his accustomed share of the sales proceeds, defendant Parrish went to plaintiff's home to advise plaintiff that he had withheld the tenant's check because the tenant owed him money. The following testimony by plaintiff and defendant Parrish is pertinent in this regard: Defendant Parrish testified that he "went to [plaintiff's] home for the purpose of telling him that [he] was holding the check because [the tenant] owed [him] money." He further testified that plaintiff informed him on this occasion that the tenant also owed plaintiff money. Plaintiff testified that defendant Parrish had told

Sugg v. Parrish

him on this occasion, "Now, if this presents any problem to you or causes you any trouble, I will release the check to you." Plaintiff also testified that he told defendant Parrish, "Just hold it and let me speak to [the tenant] and get some background and I will call you back."

This evidence presents very different circumstances from those in *Adams*, where the check had been delivered to tenant and tenant had converted the proceeds to his own use prior to any direct dealings between the landlord and the warehousemen. While the evidence here may permit a finding that plaintiff waived his lien rights or was estopped to assert them, it does not compel that finding as a matter of law. On the contrary, it clearly permits a finding that defendant Parrish had knowledge of plaintiff's superior claim; was requested by plaintiff not to make any disposition of the tenant's accustomed share pending further instructions from plaintiff; and nevertheless applied the proceeds to his own use or that of the warehouse in disregard of plaintiff's superior lien rights. Justice (later Chief Justice) Bobbitt's statement in *Hall v. Odom*, a case factually similar to the case at bar, is equally applicable here: "Upon the present record, the plaintiff's evidence is sufficient to make out a *prima facie* case, requiring submission to the jury on the issues raised by the complaint and answer; and the undisputed evidence fails to disclose either waiver or estoppel as a matter of law." 234 N.C. at 72, 81 S.E. 2d at 134.

The trial court should deny motions for directed verdict . . . when, viewing the evidence in the light most favorable to the plaintiff and giving the plaintiff the benefit of all reasonable inferences, it finds "any evidence more than a scintilla" to support plaintiff's *prima facie* case in all its constituent elements."

Hunt v. Montgomery Ward and Co., 49 N.C. App. 638, 640, 272 S.E. 2d 357, 360 (1980). The record contains substantially more than a scintilla of evidence tending to establish in plaintiff a landlord's lien and tending to deny a waiver by plaintiff of his rights under that lien. The trial court thus properly denied defendants' motion for a directed verdict, and defendants' assignment of error thereto is overruled.

[2] Defendants next assign error to the exclusion of certain testimony which they attempted to elicit from plaintiff on cross

Sugg v. Parrish

examination. Plaintiff was questioned regarding transactions by the tenant at a warehouse other than defendants' during the year preceding that of the transactions in question. If allowed, plaintiff would have answered that he had with his tenant the arrangement previously described in both years; that he knew the tenant sold tobacco for him in the preceding year, primarily at a warehouse in Goldsboro; that plaintiff was not present at those sales; that the tenant would bring plaintiff his share of the sales proceeds, sometimes in one check made out jointly and sometimes in a separate check; and that the tenant would furnish plaintiff copies of the tobacco sales bills which had been furnished by the warehouse.

Defendants contend this evidence should have been admitted to show that plaintiff had on prior occasions vested the tenant with authority to sell in the same manner that he did in 1977. We find no prejudicial error in the exclusion of the evidence, however. The evidence clearly had no bearing on the issue as to the existence of plaintiff's lien. There was no evidence tending to show that defendants had knowledge of or placed reliance on a course of dealings established between plaintiff, his tenant and a warehouse other than defendants' during the preceding year. The evidence thus had no relevance as to the issue of whether plaintiff had waived his lien for the 1977 crops. Further, plaintiff testified: "The ... arrangement that we had in 1977 was not the first year we had that arrangement." Thus the substance of the evidence defendants attempted to elicit by this line of questioning was before the jury. This assignment of error is overruled.

Defendants' third assignment of error relates to various aspects of the court's instructions to the jury.

It is well settled that the jury charge must be considered contextually as a whole, and when so considered if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, we will not sustain an exception for that the instruction might have been better stated.

Jones v. Development Co., 16 N.C. App. 80, 86-87, 191 S.E. 2d 435, 439-440 *cert. denied* 282 N.C. 304, 192 S.E. 2d 194 (1972). We have examined carefully the charge in its entirety, especially the portions complained of. We find no reasonable cause to believe

Sugg v. Parrish

the jury was misled or misinformed by the court's presentation of the law of the case. Nor do we find merit in defendants' contention that the instructions, taken as a whole, constituted an expression of opinion by the court in violation of G.S. 1A-1, Rule 51(a). This assignment of error is overruled.

[3] Defendant finally assigns error to the court's failure to instruct with regard to evidence that the tenant had executed a note for the sum he owed plaintiff and that plaintiff had filed a claim against the tenant's estate for the amount of the note. They contend that "an issue arose" as to whether plaintiff by acceptance of the note had waived any statutory lien he might have. The record indicates that the parties stipulated to the issues. Defendants thus cannot now contend that a separate issue should have been submitted with regard to the note. Further, "[t]he trial [court] is not required to review all of the evidence . . ." *Maynard v. Pigford*, 17 N.C. App. 129, 130, 193 S.E. 2d 293, 294 (1972). It did review much of the evidence bearing on the stipulated issue of waiver. It also instructed the jury that it was "to take [its own] recollection as to what the evidence was . . ." It further instructed:

The fact that I recite to you certain portions of the testimony in my Charge . . . and not other portions . . . does not mean that I place greater importance on that which I lift up to you and less importance on that which I do not bring to your recollection. . . . I charge you that all of the evidence is of equal importance.

Finally, at the end of the charge the court asked if there were further contentions; and defendants made no requests. Under these circumstances we can find in the court's failure to instruct regarding this aspect of the evidence no prejudice to defendants sufficient to warrant a new trial.

No error.

Judges HEDRICK and CLARK concur.

State v. Clontz

STATE OF NORTH CAROLINA v. RAYMOND CRANFORD CLONTZ

No. 8019SC1003

(Filed 5 May 1981)

Criminal Law § 89.7; Witnesses § 1— refusal to order psychiatric examination of rape victim

In this prosecution for second degree rape of a mentally retarded female, the trial court did not have the authority to grant defendant's motion to require a psychiatric examination of the alleged victim. Even if the trial court had the inherent authority to require the alleged victim to submit to a psychiatric examination, the trial court did not abuse its discretion in the denial of defendant's motion where an expert witness who testified for the State gave testimony which supported defendant's contentions and was damaging to the credibility and reliability of the alleged victim.

Judge BECTON dissenting.

APPEAL by defendant from *Albright, Judge*. Judgment entered 15 May 1980 in Superior Court, CABARRUS County. Heard in the Court of Appeals 3 March 1981.

Defendant was tried on a bill of indictment charging him with second degree rape in that he did

feloniously rape, ravish, carnally know, and engage in vaginal intercourse with Donna Safrit by force and against her will while the said Donna Safrit was mentally defective, mentally incapacitated and physically helpless and while the said Raymond Clontz knew and should reasonably have known that Donna Safrit was mentally defective, mentally incapacitated and physically helpless.

The State offered evidence tending to show that defendant forced a 20-year-old mentally retarded female to engage in intercourse with him against her will. The State also offered evidence tending to show that she had an I.Q. of less than 60, lived in a household of conflicts, was afraid of men and displayed a tendency to project blame on others. She also suffers from the afflictions of cerebral palsy.

Defendant did not testify but did offer evidence tending to show that he did not engage in intercourse with the alleged victim.

State v. Clontz

Defendant was found guilty as charged, and judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Assistant Attorney General J. Chris Prather, for the State.

Cecil R. Jenkins, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant first argues that he was not given enough time for discovery after the return of the bill upon which he was tried. Although we do not concede that defendant is correct in this, the question is relevant here only if he is correct in his second argument: that the judge should have granted his motion to require the victim of the alleged rape to submit to a psychiatric examination. We conclude that the judge correctly denied the motion, and, since that was the only additional discovery contemplated, there was no error in the denial of defendant's motion for continuance of the case.

In denying defendant's motion for a compulsory psychiatric examination of the State's principal witness, the trial judge followed, as must we, the decision of our Supreme Court in *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978), where the Court, after a thorough review of cases from other jurisdictions concluded:

To require a witness to submit to a psychiatric examination, by a psychiatrist not selected by the witness, is much more than a handicap to the party proposing to offer him or her. It is a drastic invasion of the witness' own right of privacy. To be ordered by a court to submit to such an examination is, in itself, humiliating and potentially damaging to the reputation and career of the witness.

. . . .

... To require the alleged victim, especially in a sex offense case, to submit to such an inquisition into her most personal and private relations and past history, as a condition precedent to permitting her to testify against her alleged assailant would certainly discourage the honest, innocent victim of a genuine assault from going to the authorities with a complaint. This is not in the public interest. A

State v. Clontz

zealous concern for the accused is not justification for a grueling and harassing trial of the victim as a condition precedent to bringing the accused to trial.

. . . .

In our opinion, the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses and other potential witnesses from disclosing their knowledge of them.

We think that so drastic a change in the criminal trial procedure of this State, if needed, should be brought about, as was done in Massachusetts, by a carefully considered and drafted statute, not by our pronouncement leaving the matter to the unguided discretion of the trial judge.

294 N.C. at 26-28, 240 S.E. 2d at 626-27.

We also hold that this case falls within the secondary position taken by Justice Lake for the majority and the position taken by Justice Exum in his concurring opinion. Even if the trial judge should be said to have the power to order an unwilling witness for the State to submit to a psychiatric examination, the case at bar is not one of those rare instances in which it should be exercised. Among other things, we note that defendant would have been hard pressed to have found expert testimony more friendly to his contentions and more damaging to the credibility and reliability of the alleged victim than that offered by the doctor who testified for the State. The record fails to show any compelling need for further psychiatric examination.

Defendant's remaining assignments of error have been considered. No prejudicial error has been shown.

No error.

Judge WELLS concurs.

Judge BECTON dissents.

Judge BECTON dissenting:

State v. Clontz

I respectfully dissent from the Court's decision upholding the trial judge's refusal to order a psychiatric examination of the prosecuting witness, Donna Safrit. In support of its position, the majority relies primarily on the North Carolina Supreme Court decision in *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978). The issues discussed by the court in *Looney* were essentially whether or not a trial judge has any discretionary authority upon motion by the defendant to order a psychiatric examination of a prosecuting witness, and if discretion exists, what constitutes abuse of that discretion.

After a lengthy analysis of the case law in other jurisdictions indicating a trend in favor of trial judges having discretionary power to compel such an examination¹, the *Looney* court said that "[i]n our opinion, the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy. . . . "294 N.C. at 28, 240 S.E. 2d at 627. The court then went on to opine that:

[i]f, however, we were to hold that judges of trial courts in North Carolina have inherent power, in their discretion, to order an unwilling witness to submit to a psychiatric examination, we would hold that, under the circumstances of the present case, it was not an abuse of that discretion to deny the motion of this defendant.

294 N.C. at 28, 240 S.E. 2d at 627. While strongly suggesting that legislative guidance is needed in this area, nowhere in the *Looney* opinion does the court unequivocally hold that a trial judge does not have the inherent discretionary authority to

1. See, Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 Calif. L. Rev. 648, 663 (1960) "Most of the courts which have dealt with this problem have recognized the authority of the trial judge to order a psychiatric examination of a witness on the question of credibility. The principle established by the majority of the cases is that the judge has the discretion to order such an examination, although the failure to do so had rarely been held an abuse of discretion." *Id.* See also *Sex Crime — Psychiatric Examination*, 18 A.L.R. 3d 1433, 1439 (1968).

State v. Clontz

order such an examination.² In fact, the court points out that "[i]t is to be observed that the denial of the defendant's motion for such order by Judge Clark was not upon the ground that the court lacked the authority to make such order, but upon the ground that, under the circumstances of this case, such order would not be issued." 294 N.C. at 17, 240 S.E. 2d at 621.

In his concurring opinion in *Looney*, Justice Exum offers the following analysis:

I would conclude that our trial judges have the power, to be carefully used in the exercise of their sound discretion, to order in appropriate circumstances the psychiatric examination of any witness as a condition to receiving the testimony of that witness. . . .

Defendant should be required to make a strong showing that the witness' mental make up is such that a psychiatric examination would probably reveal either that the witness is incompetent or that the witness' credibility may be subject to serious question. Situations calling for the entry of such an order would, it seems, be rare indeed. But if called for, our judges should have the power to enter the order.

294 N.C. at 29, 240 S.E. 2d at 628.

The inconclusive nature of the majority opinion in *Looney* and the fact that the question of the trial judge's authority to order an examination was not squarely before the court lead me to believe that our Supreme Court has not definitively ruled that trial judges have no discretionary power to order psychiatric examinations where appropriate. Indeed, the better view, I think, is the one ascribed to above by Justice Exum and by an increasing number of other jurisdictions. See *Forbes v. State*, 559 S.W. 2d 318 (Tenn. 1977); see also Annot., 18 A.L.R. 3d 1433 (1968).

2. See *State v. Looney: Defendants' Need for Court-Ordered Psychiatric Evaluations of Witnesses' Credibility Outweighed by Witnesses' Right to Privacy*, 57 N.C.L. Rev. 448, 451 (1979). The opinion "suggests that the supreme court only reached a firm conclusion on the propriety of ordering an exam, not on the power of the court to order the exam." *Id.* at 45ln.25. Significantly, the State in *Looney* conceded in its Brief to the Supreme Court that the lower court judge did in fact have discretionary authority to order an examination, but on the facts of the case, the judge had not abused that discretion. *Id.* at 45ln.26.

State v. Clontz

The *Looney* court's emphasis on balancing the defendant's need for a court ordered psychiatric evaluation of the prosecuting witness for credibility and competency purposes against the witness' right to privacy indicates that in at least some situation contemplated by the court, the defendant's interests might prevail. The case at bar presents, in my opinion, such a fact situation, and one distinguishable from the facts in *Looney*.

On the record before us, the defendant was prosecuted and convicted under a statute making it unlawful to engage in vaginal intercourse with another person: "(2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless." G.S. 14-27.3. In this case, then, the indictment³ itself established that Ms. Safrit was mentally infirm, and in fact mentally retarded with an IQ of less than 60. In *Looney*, the defendant argued that the particularly violent manner in which the witness killed the defendant's wife was sufficient to establish a psychological instability necessitating further examination; the court rejected this rationale.

The evidence at trial in the case *sub judice* also indicates that Ms. Safrit's testimony was corroborated only by her brother-in-law who repeated on the stand what Ms. Safrit had told him the day after the alleged rape took place. No independent corroborative evidence was offered by the State. The defendant's evidence directly contradicted this evidence and tended to show that Raymond Clontz was on the phone and in the presence of David Hargett during the entire time that Ms. Safrit alleges the rape occurred. Courts in other jurisdictions have been most willing to order psychiatric examinations of prosecuting witnesses in sex offense cases in which there is little or no corroboration of the prosecuting witness' charges. 18 A.L.R. 3d at 1439.

3. The Indictment reads, "The Jurors for the State upon their oath present that on or about the 2nd day of February, 1980, in Cabarrus County Raymond Cranford Clontz unlawfully and wilfully did feloniously carnally know and abuse Donna Safrit who was at the time mentally defective and physically helpless."

State v. Clontz

Moreover, in a psychological examination of Ms. Safrit conducted by the North Carolina Department of Vocational Rehabilitation ten months prior to trial, it was revealed that she had a tendency to project blame onto others and was afraid of men believing them to be people "who come to get you or hurt you or rape you." The examining psychologist, Dr. Crombes, testified:

Ms. Safrit has the tendancy [sic] to project blame onto others. She is a mistrustful kind of person, sensitive to what people were thinking or feeling about her and she would have a hard time seeing things as being her fault. I don't see her as being paranoid, but she has a personality attribute in which she has a hard time recognizing what part she plays in situations. Her tendancy [sic] to project blame onto others is somewhere between mild and moderate in degree. In a conflictual situation she would accept blame, and perhaps at least as often would reject it. (Record testimony of Dr. Peter Crombes.)

It is important to note that Dr. Crombes was a witness for the State, and no attempt was made by the State to prevent Dr. Crombes from testifying in great detail about Ms. Safrit's mental condition, "her most personal and private relations and past history. . . ." 294 N.C. at 27, 240 S.E. 2d at 627. Whatever right to privacy Ms. Safrit had, the State itself planned and made the first "drastic invasion" of that right to privacy. The State should not now be permitted successfully to argue that a further examination on defendant's motion would be a serious invasion of Ms. Safrit's remaining privacy rights. An additional examination of Ms. Safrit would not have invaded her right to privacy any more so than the public airing contemplated and made by the State's own case in chief. On balance then, the witness' right to privacy in this case can hardly be said to outweigh the constitutional rights of the defendant to confront and effectively cross examine this witness.

The majority opinion takes the position that the testimony by Dr. Crombes was so helpful to the defendant and so damaging to the credibility of the alleged victim that the defendant "would have been hard pressed to have found expert testimony more friendly to his contentions. . . ." We are jurists, not jurors, not psychologists, not psychiatrists. It is difficult therefore, if

Roberts v. Heffner

not impossible, for this court to hold that a psychiatric examination would not have disclosed additional evidence helpful to the defendant's attempt at establishing the witness' lack of credibility and competency. The tests conducted by the Department of Vocational Rehabilitation were designed to elicit information about Ms. Safrit's employability; the tests were not specifically designed to determine her credibility and competency to testify. If the court finds the information from these tests damaging to the witness, one wonders what would be elicited by a psychiatric examination designed for the express purpose of analyzing Ms. Safrit's competency to testify and overall credibility for the truth.

This dissent is in no way a clarion call in support of Dean Wigmore's admonition that "no judge should ever let a sex offense charge go to the jury unless the female complainant's sexual history and mental make up have been examined and testified to by a qualified physician." 3A Wigmore, Evidence §924a (1970). It is, however, a recognition that in certain rare cases, like the one at bar, the trial judge should in his discretion order a psychiatric examination of the prosecuting witness. In balancing the defendant's Fifth and Fourteenth Amendment due process rights to confront and effectively cross examine his accuser against the possible invasion of the prosecuting witness' right to privacy, the accused's rights in this case are superior. Under the facts and circumstances of this case then, I dissent from the court's decision upholding the trial judge's denial of defendant's motion and would order a new trial to take place after a thorough psychiatric examination of the prosecuting witness had been conducted.

DEREK ROBERTS AND ANN ROBERTS v. JOHNNY E. HEFFNER, SR.
AND WANDA C. HEFFNER

No. 8025SC955

(Filed 5 May 1981)

1. Appeal and Error § 6.2—interlocutory order affecting substantial right – right to appeal

In an action arising out of a contract between the parties whereby defendants agreed to construct a house on a piece of property owned by them

Roberts v. Heffner

and to convey the completed house and property to plaintiffs, the trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass but allowing defendants to assert these counterclaims as set-offs to plaintiffs' claim was not a final judgment; however, the judgment in question affected a substantial right of defendants, their right to recover on their claims based on the contract, and the absence of an immediate appeal would work an injury to them, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice, if not corrected before an appeal from a final judgment.

2. Contracts § 6.1; Professions and Occupations § 2—unlicensed general contractors – claims under contract barred – structure built on builders' property

The trial court's conclusions that the defendants were unlicensed general contractors who had contracted to construct a dwelling for plaintiffs for a price in excess of \$30,000.00 supported its judgement that defendants were barred from affirmatively asserting their claims under the contract, and there was no merit to defendants' contention that they should not be so barred because they contracted to build the dwelling on their own property, since a builder, who is unable or unwilling to obtain a general contractor's license from the State of N.C., should not be allowed to thwart the plain intent of G.S. 87-1 by the artifice of contracting to build a residence for another on the builder's land.

APPEAL by defendant from *Grist, Judge*. Judgment entered 2 June 1980 in Superior Court, CATAWBA County. Heard in the Court of Appeals 10 April 1981.

On 6 November 1978 plaintiffs and defendants entered into a written agreement captioned "CONTRACT OF PURCHASE AND SALE" [hereinafter "the contract"] whereby the defendants agreed, for a stated consideration of \$80,000.00 plus overages, to construct a house on a certain piece of real property owned by defendants and to convey the completed house and property to plaintiffs. The contract contained detailed specifications pertaining to construction of the house. During the course of the construction, various disagreements arose between the parties which culminated in this lawsuit.

Plaintiffs filed a complaint on 13 September 1979 seeking specific performance of the contract or money damages in lieu thereof, a temporary restraining order allowing plaintiffs exclusive possession of the premises and a preliminary injunction to the same effect. A temporary restraining order to that effect was issued on 13 September 1979. On 1 October 1979, a partial settlement was reached by the parties under which defendants conveyed title to the property to plaintiffs and the plaintiffs

Roberts v. Heffner

paid defendants the contract price of \$80,000.00 with the agreement that matters remaining in controversy would be litigated at a later time by the parties. On 8 November 1979, plaintiffs filed an amended complaint seeking \$20,000.00 in actual damages, \$50,000.00 in punitive damages and attorneys' fees for the alleged malicious prosecution of plaintiff Derek Roberts by defendants for trespassing on the property. On 9 November 1979, defendants answered plaintiffs' complaint and amended complaint and counterclaimed for breach of contract by plaintiffs. Based on the terms of the contract, defendants counterclaimed for damages for material and labor overages incurred in constructing the house, for interest expenses incurred in constructing and selling the house to plaintiffs, for liquidated damages, for attorneys' fees, for trespass prior to the conveyance of the property to plaintiffs and for defamation. On 6 December 1979 plaintiffs filed a reply to defendants' counterclaims denying most of the allegations. On 22 April 1980 plaintiffs, by leave of the trial court, amended their reply to defendants' counterclaims by adding a plea in bar as a defense. Plaintiffs asserted that defendants did not hold a general contractor's license as required by N.C. Gen. Stat. § 87-1 and that § 87-1 is a complete defense and bar to defendants' counterclaims against plaintiffs under the contract or under *quantum meruit*. On 6 May 1980, defendants replied to plaintiffs' plea in bar denying that § 87-1 applied to the transaction in question, denying that defendants were general contractors within the meaning of § 87-1 and requesting that plaintiffs' plea in bar be dismissed.

On 2 June 1980, the trial court held an evidentiary hearing on plaintiffs' plea in bar. At the hearing, as stipulated by the parties, the evidence tended to show in pertinent part that the parties entered into the contract as alleged in the complaint; that defendants supervised construction of the house; that the work done by defendants or which defendants supervised was of an amount in excess of \$30,000.00; and that defendants had never been licensed to practice general contracting in the State of North Carolina in accordance with § 87-1 *et seq.* Based on the pleadings and the evidence, the trial court entered a judgment finding facts and concluding as a matter of law that defendants were unlicensed general contractors in contravention of § 87-1 and that defendants therefore were not entitled to assert any counterclaims for "overages, extras or breach of contract relat-

Roberts v. Heffner

ing to construction of the dwelling." From the judgment and order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass; but allowing defendants to assert these counterclaims as set-off to plaintiffs' claim, defendants appeal.

Cagle and Houck by William J. Houck, for the plaintiffs-appellees.

Tate, Young and Morphis by Thomas C. Morphis, for the defendants-appellants.

MARTIN (Robert M.), Judge.

First we note that under N.C. Gen. Stat. § 1A-1, Rule 7(c), "pleas" are specifically abolished; but under Rule 12(b), every defense may be raised by responsive pleading — in this case by reply to defendants' counterclaims. A defense which introduces new matter in an attempt to avoid defendant's counterclaim, regardless of the truth or falsity of the allegations in the counterclaim, is an affirmative defense. N.C. Gen. Stat. § 1A-1, Rule 8(c). Thus, plaintiffs' "plea in bar" asserting that defendants were barred from any recovery of damages for breach of contract or under the theory of *quantum meruit* or unjust enrichment was an affirmative defense to defendants' counterclaims and the trial court, at the parties' request, conducted a trial on that issue, prior to a full trial on the merits.

[1] The threshold question which we must consider, although not argued by the parties in their briefs, is whether an appeal lies from the order in question. If this is a fragmentary, and therefore premature, appeal, we must dismiss the appeal *ex mero motu*. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980).

A party has a right to appeal a judgment of a trial court under N.C. Gen. Stat. §§ 1-277 and 7A-27 if the judgment is (1) a final order, or (2) an interlocutory order affecting some substantial right claimed by the appellant which will work an injury to him if not corrected before an appeal from a final judgment. *Bailey v. Gooding, supra; Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Bailey v. Gooding*,

Roberts v. Heffner

supra at 209, 270 S.E. 2d at 433, quoting *Veazey v. Durham*, *supra* at 361-2, 57 S.E. 2d at 381. Clearly the judgment in question is not a final judgment, as plaintiffs' claims for specific performance of the contract or money damages in lieu thereof, and for malicious prosecution and defendants' right to set-off and their counterclaim for defamation remain to be tried.

The question remains whether the judgment in question affects some substantial right claimed by defendants which will work an injury to them if not corrected before an appeal from a final judgment. *Bailey v. Gooding*, *supra*; *Industries, Inc. v. Insurance Co.*, *supra*; *Veazey v. Durham*, *supra*. The judgment in question dismissed defendants' compulsory counterclaims, but did not entirely bar them. The judgment stated that defendants could enforce the contract defensively, as a set-off, to the claim asserted against them by plaintiffs. The set-off, however, cannot exceed the plaintiffs' claims. See *Furniture Mart v. Burns*, 31 N.C. App. 626, 230 S.E. 2d 609 (1976). The absence of a right of immediate appeal will force defendants to undergo a full trial on the merits. At that trial, if the jury determines that plaintiffs are not entitled to specific performance of the contract or money damages in lieu thereof, it will not reach the determination of whether defendants should prevail on their claims based on the contract. If the jury determines that plaintiffs are entitled to recover some amount, it will be limited by that amount in answering the question of to what amount, if any, of set-off the defendants are entitled. Thus, it would not reach a determination of the full amount the defendants are entitled to recover on their counterclaims if they are not barred from recovery by N.C. Gen. Stat. § 87-1. If defendants are correct on their legal position and prevail on appeal from the final adjudication of this case, they would then be forced to undergo another full trial on the merits in order to recover on their counterclaims based on the contract.

In our opinion, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice makes it clear that the judgment in question works an injury to defendants if not corrected before an appeal from a final judgment. The burden on defendants in this case of being forced to undergo two full trials is much greater than that suffered by the appellant in *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978) (the necessity of rehearing its sum-

Roberts v. Heffner

mary judgment motion), or by the appellant in *Bailey v. Gooding, supra* (the necessity of undergoing a full trial on the merits instead of a trial solely on the issue of damages) or by the appellant in *Industries, Inc. v. Insurance Co., supra* (the necessity of undergoing a trial on the issue of damages). We conclude that the judgment in question affects a substantial right of the defendants, their right to recover on their claims based on the contract, and that the absence of an immediate appeal will work an injury to them if not corrected before an appeal from a final judgment. This appeal, therefore, is not premature.

[2] Having passed on the threshold question, we now consider the appeal on its merits. Defendants make two arguments on appeal: first, that the provisions of § 87-1 do not apply to a landowner who contracts to construct a dwelling on his own property and to subsequently convey that property with the completed dwelling thereon and second, that § 87-1 is unconstitutional as applied to defendants as a violation of Article I, Section 10, of the United States Constitution.

Defendants did not make any exceptions to the findings of fact or conclusions of law made by the court in its judgment. Their sole exception in the record is to their entry of appeal. The scope of review on appeal, therefore, is limited to whether the judgment in question is supported by the court's findings of fact and conclusions of law. Rule 10(a), N.C. Rules App. Proc. Due to the defendants' failure to except to any findings of fact, the trial court's findings are deemed to be supported by substantial competent evidence and are conclusive upon appeal. *Grimes v. Sea & Sky Corp.*, 50 N.C. App. 654, 274 S.E. 2d 877 (1981); *In re Vinson*, 42 N.C. App. 28, 255 S.E. 2d 644 (1979).

The courts of this State have held that an unlicensed person who, in disregard of § 87-1, contracts with another to construct a building for the cost of \$30,000.00 or more, may not affirmatively enforce the contract or recover for his services and materials supplied under the theory of *quantum meruit* or unjust enrichment. *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E. 2d 710 (1977); see, *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). However, the unlicensed general contractor may enforce his contract defensively, as a set-off, to claims asserted against him. *Id.* N.C. Gen. Stat. § 87-1 provides, in pertinent part:

Roberts v. Heffner

For the purpose of this Article, a "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building . . . where the cost of the undertaking is thirty thousand dollars (\$30,000) or more. . . .

The contract price is the cost of the undertaking. *Furniture Mart v. Burns*, 31 N.C. App. 626, 230 S.E. 2d 609 (1976); *Fulton v. Rice*, 12 N.C. App. 669, 184 S.E. 2d 421 (1971). Although the contract between the parties in the present case stated that \$80,000.00 plus overages was the total consideration for the purchase of the land and the completed residence, the trial court found as fact that the defendants had contracted to construct a dwelling for plaintiffs for a cost of \$80,000.00. As previously stated, we are bound by this finding on appeal due to the defendants' failure to except to the court's findings of fact. *Grimes v. Sea & Sky Corp.*, *supra*; *In re Vinson*, *supra*. This finding supports the trial court's conclusion that the defendants contracted to construct a dwelling for plaintiffs for a price in excess of \$30,000.00.

As stated in *Helms v. Dawkins*, *supra* at 456, 232 S.E. 2d at 712, "[n]ot every person who undertakes to do construction work on a building is a general contractor, even though the cost of his undertaking exceeds \$30,000. (citation omitted.)" The principal characteristic of a general contractor, as opposed to a subcontractor or mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project. *Id.* In the present case, the trial court found as fact that the defendants had no contractors' license in accordance with § 87-1 *et seq*; that they had contracted "to construct a residence for the plaintiffs"; and that the defendants "hired subcontractors, obtained construction loans, obtained building permits, paid subcontractors and generally supervised construction of the house." These findings, which are deemed to be conclusive on appeal, *Grimes v. Sea & Sky Corp.*, *supra*; *In re Vinson*, *supra*, fully support the court's conclusion that the defendants were acting as unlicensed general contractors.

The court's conclusions that the defendants were unlicensed general contractors who had contracted to construct a dwelling for a price in excess of \$30,000.00 support its judgment that defendants are barred from affirmatively asserting their

Roberts v. Heffner

claims under the contract. *Helms v. Dawkins, supra*. The defendants' argument that they should not be so barred because they contracted to build the dwelling on their own property is not persuasive. Although we have been unable to find any case applying the § 87-1 prohibition to a builder who constructed a building on his own land, in our opinion, ownership of the land has nothing to do with the purpose of the prohibition. The purpose of § 87-1 is to regulate builders and "to protect the public from incompetent builders by forbidding them to maintain an action on their contracts, thereby discouraging them from undertaking projects beyond their capabilities. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968)." *Furniture Mart v. Burns, supra* at 633, 230 S.E. 2d at 613. A builder, who is unable or unwilling to obtain a general contractor's license from the State of North Carolina, should not be allowed to thwart the plain intent of § 87-1 by the artifice of contracting to build a residence for another on the builder's land. This is not tantamount to holding, as defendants suggest, that any person is prevented by § 87-1 from building anything on his own property and *subsequently* undertaking to sell what he has built. As the language of the statute suggests, the § 87-1 prohibition applies only to a builder who contracts with another to construct any building without obtaining the requisite license, regardless of who owns the land upon which the building is to be constructed.

We do not reach defendants' constitutional argument for two reasons: (1) the exception on which it is purportedly based is an exception to their entry of notice of appeal and (2) the record discloses that defendant failed to raise it at the trial court level. This Court will not pass upon a constitutional question not raised and considered in the court from which the appeal was taken. *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976).

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

Judges WHICHARD and BECTON concur.

Insurance Co. v. Allison

NATIONWIDE MUTUAL INSURANCE COMPANY v. JANET K. ALLISON,
GARY ROBERT ALLISON, LESLIE NORMAN CHURCH, FRED
MICHAEL BARBER, BOBBIE DIANNE PANGLE AND DAVID L.
PANGLE

No. 8025SC524

(Filed 5 May 1981)

1. Declaratory Judgment Act § 10- declaratory judgment – appellate review

The trial court's findings of fact in a declaratory judgment are conclusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed even though there is evidence which might sustain findings to the contrary and even though incompetent evidence may have been admitted.

2. Insurance § 87- automobile liability insurance – spouse of person named in policy – resident of same household – permission of spouse to drive vehicle

In a declaratory judgment action involving an automobile liability insurance policy which provided that "named insured" included the spouse of the individual named in the policy if "a resident of the same household," the evidence supported the trial court's determination that the wife of the owner of the insured automobile was a resident of the same household with the owner at the time the automobile was involved in a collision in New Mexico and was thus a "named insured" under the policy where there was evidence that the owner's wife, her boyfriend, and three friends were on their way to Arizona in the insured automobile when the accident occurred; the owner and his wife were living together when the wife departed on the trip to Arizona; subsequent to her departure from North Carolina, the wife still considered her residence to be her "home" with her husband in North Carolina; the owner continued to consider his wife to be a member of his household; and the wife in fact resumed her residence with her husband upon her return to North Carolina. Furthermore, the trial court properly found that the boyfriend, who was operating the automobile with the permission of the owner's wife at the time of the accident, was an insured under the policy in that he was a person using the automobile with the permission of the named insured and within the scope of such permission.

APPEAL by plaintiff from *Riddle, Judge*. Judgment entered 19 March 1980 in Superior Court, CALDWELL County. Heard in the Court of Appeals 4 December 1980.

Plaintiff filed a complaint pursuant to the Uniform Declaratory Judgment Act, G.S. 1-253 *et seq.*, seeking construction of provisions of a policy of automobile liability insurance with reference to an accident. The complaint alleged the following:

Plaintiff had entered a contract of automobile liability insurance with defendant, Gary Robert Allison, covering a 1971

Insurance Co. v. Allison

Ford Mustang automobile which he owned. The policy covered Gary Allison as "named insured" and "any resident of the same household" together with "any other person using such automobile with the permission of the named insured, provided his actual operation or . . . his other actual use thereof is within the scope of such permission."

On 22 May 1977, while the policy was in effect, the automobile was involved in an accident in New Mexico. At the time the car was being driven by defendant Leslie Norman Church; and the defendants Janet K. Allison, Fred Michael Barber, Bobbie Dianne Pangle and David L. Pangle were passengers. Plaintiff alleged "that some or all of the defendants contend or may contend that the plaintiff's policy . . . provides various coverages for Leslie Norman Church and Janet K. Allison in regard to the . . . accident." It further alleged that defendant Fred Michael Barber had filed a civil action against Church and Janet Allison on 18 January 1978 for injuries allegedly sustained as a proximate result of the accident.

Evidence in the record included the following:

The Allisons had been married for almost three years at the time of the accident. They had experienced domestic difficulties just prior to the accident and had separated briefly on two occasions. They were living together when Janet Allison departed on the trip to New Mexico, however; and they had never been separated overnight. Gary Allison described the brief separations as "cooling-off" periods.

Janet Allison had become acquainted with defendant Church when she went to work at a textile plant. She and Church "had dated each other or gone places together . . . on quite a few occasions." Defendants Fred Michael Barber and Bobbie Dianne Pangle had been present on several occasions when Janet Allison and Church were together. Janet Allison described these occasions as "more or less a double-dating sort of situation."

On 18 May 1977 Janet Allison, Church, Barber and Bobbie Dianne Pangle were together in the 1971 Ford Mustang automobile which was titled to Gary Allison. Church indicated he was going to Arizona, and the others agreed to go along. They also took with them defendant David L. Pangle, the minor son

Insurance Co. v. Allison

of defendant Bobbie Dianne Pangle. The group stayed in motels en route. Janet Allison and Church stayed together and had sexual relations at both stops on the trip.

The accident occurred 22 May 1977 in New Mexico while Church was driving. Janet Allison testified that Church never drove the car without her permission and that he had her permission to drive at the time.

Gary Allison did not hear from his wife from the time she left home until he was called regarding the accident. He went to New Mexico and stayed with her until she was well enough to return to their home in North Carolina. At the time their depositions were taken the Allisons were living together and had a four month old daughter.

The court found as facts that the policy covered Gary Allison as "named insured"; that the definition of "named insured" included the individual named as well as his spouse, if the spouse was a resident of the same household; that Janet Allison was the spouse of Gary Allison and was a resident of the same household when the policy was issued and had continuously remained such since then; that Church was operating the automobile with the permission of Janet Allison; and that at the time of the accident the policy was in full force and effect. It concluded as a matter of law that Janet Allison was a "named insured" under the policy; that Church was an insured in that he was a person using the automobile with the permission of the named insured and within the scope of such permission; that plaintiff afforded coverage to Janet Allison and Church for the accident in the full amounts stated in the policy; and that plaintiff "shall be liable to the defendants" for any damages resulting from the accident up to the policy limits. It thereupon ordered that plaintiff afford coverage to Allison and Church concerning the accident, and that plaintiff "is liable" to defendants for any damages sustained therein.

From this judgment, plaintiff appeals.

Robert R. Gardner, and Patrick, Harper and Dixon, by Stephen M. Thomas, for plaintiff appellant.

Donald T. Robbins for defendant appellee Fred Michael Barber.

Insurance Co. v. Allison

No brief filed for defendant appellees Janet K. Allison, Gary Robert Allison, Leslie Norman Church, Bobbie Dianne Pangle and David L. Pangle.

WHICHARD, Judge.

[1] The parties stipulated that the case might be heard by the court without a jury. They thereby waived a jury trial and empowered the court to resolve any issues of fact which were raised, a procedure authorized by G.S. 1-262. The orders, judgments, and decrees of a court under the Declaratory Judgment Act "may be reviewed as other orders, judgments and decrees." G.S. 1-258. The statute "provides for review under the same rules that apply in cases not brought pursuant to the act." *Dickey v. Herbin*, 250 N.C. 321, 325, 108 S.E. 2d 632, 635 (1959). The rule thus applicable is that the court's findings of fact are conclusive if supported by any competent evidence; and a judgment supported by such findings will be affirmed, even though there is evidence which might sustain findings to the contrary, and even though incompetent evidence may have been admitted. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Transit, Inc., v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974); *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845 (1966); *Church v. Church*, 27 N.C. App. 127, 218 S.E. 2d 223 *cert. denied* 288 N.C. 730, 220 S.E. 2d 350 (1975). The function of our review is, then, to determine whether the record contains competent evidence to support the findings; and whether the findings support the conclusions.

A certified copy of the policy of insurance is part of the record. The policy reflects its issuance by the plaintiff to the defendant Gary Allison. It further reflects that it covered the automobile involved; that its effective dates covered a period which included the date of the accident; and that it covered the defendant Gary Allison as "named insured." "Named Insured" was defined therein as "the individual named in the declarations and also . . . his spouse, if a resident of the same household." The policy described the "Persons Insured" as including "(1) the Named Insured and any resident of the same household, [and] (2) any other person using such automobile with the permission of the Named Insured, provided his actual opera-

Insurance Co. v. Allison

tions or ... his other actual use thereof is within the scope of such permission." The facts found with regard to the policy itself are apparent from the face of the record and clearly merit sustention.

[2] After finding that by definition the phrase "named insured" included the spouse of the individual named if "a resident of the same household," the court found that Janet Allison was the spouse of Gary Allison and was a resident of the same household "when the contract of automobile liability insurance was written and ... continuously ... since [it] was written." The record contains plenary evidence to sustain the finding that the Allisons were married at the time in question. Both spouses testified to the marriage; no contrary evidence was offered; and plaintiff takes no exception to this finding. Plaintiff does except, however, to the finding that Janet Allison was a resident of Gary Allison's household. It contends that she ceased to be such when she departed on the ill-fated frolic of her own. The record, however, contains competent evidence from which the trial court could find as it did, evidence to the contrary notwithstanding.

Janet Allison testified that her purpose in going to Arizona was "[j]ust to go." She testified that she did not discuss "going out there and ... starting life all over again." At the time she left she did not have any plans one way or the other about coming back. When she got to Texas, though, she "was ready to *come back home*." She "was just about getting ready to give up and *come home*." She "was just wanting to stop and stay or *come back home* or something." On one occasion she told the defendant Bobbie Dianne Pangle that she "would like to *go back home*."¹ Further, Gary Allison testified as follows:

Q. Was she a member of your household at that time?

A. Yes sir.

The evidence recited indicates that the defendant Janet Allison, subsequent to her departure from North Carolina, still considered her residence to be her "home" with the defendant Gary Allison. It further indicates that the defendant Gary Alli-

¹Emphasis supplied *passim*.

Insurance Co. v. Allison

son continued to consider her a member of his household. Other evidence indicates that Janet Allison in fact resumed her residency with Gary Allison upon her return. We find this evidence sufficient to support the trial court's finding that Janet Allison was a resident of the same household with Gary Allison at the time of the accident; and the trial court's finding to that effect must therefore be sustained.

The trial court further found that Janet Allison gave Church permission to operate the automobile. Janet Allison had testified: "Mike and Les never drove this car without my permission. Mr. Church had my permission at the time this accident happened." Thus this finding, too, is supported by the evidence; and it, too, must be sustained.

The facts found support the conclusion that Janet Allison, as a resident of the same household with Gary Allison, was a "named insured"; and that Church, as a permittee of a named insured, driving the automobile within the scope of the permission, was an "Insured" under the terms of the policy.² The order that plaintiff's policy provides coverage to the defendants Janet Allison and Church for such liability as may be established resulting from the accident thus properly declared the "rights, status, and other legal relations"³ of the parties resultant upon the facts found and conclusions entered. The judgment of the trial court is therefore

Affirmed.

Judges HEDRICK and CLARK concur.

²See generally Annot., 93 A.L.R. 3d 420 (1979) (who is "resident" or "member" of same "household" or "family" as named insured). See also *Marlowe v. Ins. Co.*, 15 N.C. App. 456, 190 S.E. 2d 417 cert. denied 282 N.C. 153, 191 S.E. 2d 602 (1972).

³G.S. 1-253.

State v. Keadle

STATE OF NORTH CAROLINA v. JOHN KEADLE

No. 8015SC833

(Filed 5 May 1981)

Searches and Seizures § 2— search by resident advisor of university dorm — evidence improperly excluded

In a prosecution of defendant for breaking and entering and larceny, the trial court erred in excluding evidence which was discovered by a resident advisor in a university dorm when he checked for lights left burning in vacant dormitory rooms and which was seized by the campus police who had obtained a search warrant for defendant's room on the basis of the resident advisor's information, since the resident advisor's contact with the State was not such as to make him a quasi law enforcement officer or agent of the State for the purpose of making the fourth amendment and the exclusionary rule applicable.

APPEAL by the state from *Brewer, Judge*. Order entered 29 May 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 29 January 1981.

Defendant was charged by indictment with the crimes of breaking and entering and larceny. He filed a pretrial motion to suppress evidence of these crimes which he claimed was seized as the result of an illegal search and seizure.

In ruling on this motion, the court considered defendant's affidavit and brief in support of the motion along with the State's responsive brief on the motion. Those documents tended to show the facts surrounding the allegedly illegal search and seizure as follows: Bob Goldberg was a resident advisor for the University of North Carolina at Chapel Hill. As such, he was in charge of the sixth floor of Ehringhaus Dormitory. Goldberg had knowledge of the theft of a Sanyo tape deck, valued at \$235, from the possession of a dorm resident, Kris R. Keeney, on 24 November 1979.

On that date, Goldberg was performing an expected function of a resident advisor of the University in checking for lights left burning in vacant dormitory rooms. He noticed the light was on in room 624, the defendant's room, and pursuant to University policy, opened the door to turn it off. While in the room, he noticed a blanket draped over an object on defendant's bed. Goldberg investigated and found a Sanyo tape deck under the blanket. He informed Kris Keeney of this discovery, and the

State v. Keadle

two returned to room 624 to examine the tape deck further. Keeney examined the tape deck and identified it by serial number as the one which had been stolen from him.

There was no evidence to indicate that when Goldberg looked under the blanket on defendant's bed, he was performing a University function, nor was there any evidence that he had any direction, instruction, or request from any law enforcement officer to do so.

Following Keeney's identification of the tape player, Goldberg and Keeney reported these occurrences and their discovery to Officer Morton of the campus police. Acting on this information, Officer Morton obtained a search warrant for defendant's room and seized the tape player. Subsequently, Officer Morton talked with defendant who admitted breaking into Kris Keeney's room and taking the tape player.

In its order of 29 May 1980, the court made findings of fact and concluded as a matter of law that the conduct of Bob Goldberg constituted an unreasonable search by an employee and agent of the State of North Carolina acting in a quasi law enforcement capacity; the information contained in the search warrant resulted from an illegal and unreasonable search; and the evidence seized pursuant to the search should be suppressed, because the search violated the constitutional rights of defendant as to reasonable search and seizure. Accordingly, the court allowed defendant's motion to suppress. The state appealed from the court's order.

Attorney General Edmisten, by Associate Attorney Sarah C. Young, for the State.

Emma Jean Levi for defendant appellee.

MORRIS, Chief Judge.

The state contends that the trial court improperly found that Bob Goldberg, as resident advisor in a University dormitory, acted as an agent of the state in a quasi law enforcement capacity when he conducted his search of defendant's dorm room. We agree.

The fourth amendment protects individuals from unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). The exclusionary rule which

State v. Keadle

was developed to enforce the restraints of the fourth amendment was applied to the federal government in *Weeks v. United States*, 232 U.S. 383, 58 L. Ed. 652, 34 S. Ct. 341 (1914), and was made binding upon the states in *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

The protections of the fourth amendment and the attendant exclusionary rule have traditionally been confined to governmental rather than private action. *Burdeau v. McDowell*, 256 U.S. 465, 65 L. Ed. 1048, 41 S. Ct. 574 (1921); *State v. Morris*, 41 N.C. App. 164, 254 S.E. 2d 241, cert. denied and appeal dismissed, 297 N.C. 616, 267 S.E. 2d 657 (1979); *State v. Reagan*, 35 N.C. App. 140, 240 S.E. 2d 805 (1978); *State v. Carr*, 20 N.C. App. 619, 202 S.E. 2d 289 (1974); *State v. Peele*, 16 N.C. App. 227, 192 S.E. 2d 67, cert. denied, 282 N.C. 429, 192 S.E. 2d 838 (1972). See Annot. 36 A.L.R. 3d 553 (1971).

In *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, reh. denied, 404 U.S. 874, 30 L. Ed. 2d 120, 92 S. Ct. 26 (1971), the United States Supreme Court affirmed its adherence to the rule of *Burdeau*. In *Coolidge* the wife of a murder suspect voluntarily gave her husband's clothes and guns to police officers who had come to her home for the purpose of checking the husband's story against whatever his wife might say and to corroborate his admission of a theft from his employer. From evidence received from the wife, the police officers procured a warrant for her husband's arrest. Justice Stewart, speaking for the Court, stated the following with regard to this issue:

Had Mrs. Coolidge, wholly on her own initiative, sought out her husband's guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence. Cf. *Burdeau v. McDowell*, 256 U.S. 465, 65 L. Ed. 1048, 41 S. Ct. 574, 13 ALR 1159.

403 U.S. at 487, 29 L. Ed. 2d at 595, 91 S. Ct. at 2048. Justice Stewart went on to say with regard to whether the exclusionary rule should have been applied under the facts of *Coolidge*:

The question presented here is whether the conduct of the police officers at the Coolidge house was such as to make

State v. Keadle

her actions their actions for purposes of the Fourth and Fourteenth Amendments and their attendant exclusionary rules. *The test, as the petitioner's argument suggests, is whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state when she produced her husband's belongings.* (Citations omitted.) . . . The exclusionary rules were fashioned "to prevent, not to repair," and their target is official misconduct. They are "to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217, 4 L. Ed. 2d 1669, 1677, 80 S. Ct. 1437. But it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. (Emphasis added.)

403 U.S. at 487-88, 29 L. Ed. 2d at 595, 91 S. Ct. at 2048-49.

Where a search and seizure is conducted by a private citizen rather than a governmental officer, the admissibility of the fruits of such a search into evidence may be supported on the ground that no fourth amendment violations are involved, but also on the ground that the purpose of the exclusionary rule, the deterrence of unlawful police conduct, would not be furthered by excluding evidence on the basis of unlawful conduct of private individuals. Therefore, where an unreasonable search is conducted by a governmental law enforcement agent, it is subject to the restraints of the fourth amendment and the exclusionary rule. Moreover, where a search is conducted by a private citizen, but only at the government's initiation and under their guidance, it is not a private search but becomes a search by the sovereign. However, a search not so purely governmental must be judged according to the nature of the governmental participation in the search process. In the instant case, we have one of those vague factual situations requiring that we look at all of the circumstances to assess the amount of governmental participation and involvement, if any, either through the resident advisor's contact with the government as an employee of the University of North Carolina or through direct governmental initiation and guidance of the search procedure.

State v. Keadle

As to the latter, there is no evidence that law enforcement officials had any part whatsoever in Bob Goldberg's initial search of defendant's room. Judge Brewer specifically found the following undisputed facts in his order of 20 June 1980 granting defendant's motion to suppress:

9. That Bob Goldberg was performing an expected function as Resident Advisor in checking for lights left on in vacant dormitory rooms.

. . .

11. That there is no evidence that when Bob Goldberg looked under the blanket on the defendant's bed that he was performing a University function, nor is there any evidence that he had any direction, instruction, or request from any law enforcement officer to do so.

. . .

13. That no law enforcement officer personally entered, nor directed anyone else's entry, into the defendant's room until after he had obtained the search warrant contained in the file of this case.

The findings of fact speak for themselves.

The crux of the state's appeal narrows to the issue of whether Goldberg's contact with the state, through his position as a resident advisor, was such as to make him a *quasi* law enforcement officer or agent of the state for purpose of making the fourth amendment and the exclusionary rule applicable to this situation. We are of the opinion that as a resident advisor, Goldberg did not have sufficient contact with the state for this purpose. As a resident advisor in a dormitory, he had neither the status nor the authority of a law enforcement officer. It would serve no useful function as a deterrent to illegal governmental searches to apply the exclusionary rule in this instance. The resident advisor, motivated by reasons independent of a desire to secure evidence to be used in a criminal conviction, would be under no disciplinary compulsion to obey the exclusionary rule. Therefore, in this instance, we think that the government contact is so tenuous as to render the fourth amendment and the exclusionary rule inapplicable.

Greene v. Lynch, Sec. of Revenue

In *State v. Kappes*, 26 Ariz. App. 567, 550 P. 2d 121 (1976), the Arizona Court of Appeals found that a routine room inspection by two resident advisors at a state university during which drugs were found in defendant's room did not constitute a governmental intrusion. Thus, the government's involvement was insufficient to invoke the fourth amendment, and, consequently, the exclusionary rule. In rendering its decision, the court stated:

The purpose of the room inspection is not to collect evidence for criminal proceedings against the student, but to insure that the rooms are used and maintained in accordance with the university regulations. While the actions of the student resident advisors in carrying out room inspections serve the internal requirements of the university, we do not find that they are tainted with that degree of governmental authority which will invoke the fourth amendment. See: *In Re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).

26 Ariz. App. at 570, 550 P. 2d at 124. The reasoning of the Arizona court parallels our own.

For these reasons, we hold that the intrusion present here did not reach the level which would necessitate the application of constitutional safeguards. Therefore, we reverse the trial court's order allowing defendant's motion to suppress this evidence and remand this case to the superior court for trial.

Reversed and remanded.

Judges VAUGHN and BECTON concur.

BETTIE APPLE GREENE, EXECUTRIX OF THE ESTATE OF NORMAN NEWMAN BROWN, DECEASED v. MARK G. LYNCH, SECRETARY OF THE DEPARTMENT OF REVENUE

No. 8019SC823

(Filed 5 May 1981)

Wills § 61; Taxation § 27—inheritance taxes—property not passing as result of valid dissent to will

Where decedent in his will left his wife either a life estate in his home or \$5,000, the residue of his estate was left to plaintiff, plaintiff was named as

Greene v. Lynch, Sec. of Revenue

executrix under the will, the surviving wife filed a dissent to the will and plaintiff brought suit to disallow the dissent, the wife would have been entitled to receive in excess of \$60,000 from deceased's estate as his surviving spouse had she established her right to dissent, plaintiff thereafter paid the wife the sum of \$31,500 from deceased's estate in settlement of her claims as surviving spouse and the wife withdrew her dissent and waived any further right to dissent to the will, plaintiff filed a notice of dismissal with prejudice of her suit against the wife and the superior court entered a judgment *nunc pro tunc* concluding that plaintiff had paid the wife an intestate share of \$31,500 by reason of her dissent and that the wife had taken nothing under the will, and an annual account of deceased's estate showing payment by plaintiff of \$31,500 to the wife as a "full settlement" was thereafter approved by the clerk of court, it was held (1) there was no valid dissent by the wife because she failed to obtain the clerk's approval of the value of the property passing to her under and outside her husband's will as of the date of his death as required by G.S. 30-1(c); (2) the clerk's approval of the annual account did not establish the wife's right to dissent because the dissent had been withdrawn and further dissent waived at the time the account was filed and approved; (3) the judgment *nunc pro tunc* was ineffective to establish the wife's right to dissent because at the time of entry of the judgment there was no action pending in which the court could enter a valid order; and (4) since no property was transferred from the deceased's estate by intestacy pursuant to a valid dissent, inheritance taxes were required to be computed on the estate solely in accordance with the terms of deceased's will even though his surviving spouse received a larger share of the estate pursuant to her settlement agreement with plaintiff than was provided for her in the will. G.S. 105-2(1).

APPEAL by plaintiff from *Walker, Judge*. Judgment entered 29 May 1980 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 10 March 1981.

This is an appeal by plaintiff, executrix of the estate of Norman Newman Brown, from entry of summary judgment in favor of defendant in plaintiff's action to recover certain inheritance taxes paid under protest by plaintiff to defendant.

The following facts are undisputed: Norman Newman Brown died testate on 14 April 1978 survived by his wife Mary Johnston Brown. In his will Brown devised and bequeathed to his wife either a life estate in his home or \$5,000, at her option. The residue of his estate was left to plaintiff, and plaintiff was named executrix under the will. On 13 September 1978 Mary Johnston Brown filed a dissent to the will, and on 20 November 1978 plaintiff, individually and as executrix, brought suit to disallow the dissent. Had she established her right to dissent Mary Johnston Brown would have been entitled to receive in

Greene v. Lynch, Sec. of Revenue

excess of \$60,000 from her husband's estate as his surviving spouse. On 17 January 1979, however, plaintiff paid to Mary Johnston Brown the sum of \$31,500 from the estate of Norman Newman Brown in settlement of her claims as surviving spouse, and plaintiff and Mary Johnston Brown executed reciprocal releases. Pursuant to those releases and on the same date thereof, Mary Johnston Brown filed a notice of withdrawal of her dissent to her husband's will, waiving therein any further right to dissent to his will, and plaintiff filed a notice of dismissal with prejudice of her suit against Mary Johnston Brown. On 3 April 1979 a judgment *nunc pro tunc* was entered in that suit by Judge F. Fetzer Mills wherein he found and concluded that plaintiff had paid Mary Johnston Brown an intestate share of \$31,500 by reason of her dissent and that Mary Johnston Brown had taken nothing under the will. The annual account in the estate of Norman Newman Brown, filed on 11 June 1979 and approved by the Clerk on 15 August 1979, showed payment by plaintiff of the sum of \$31,500 to attorneys for Mary Johnston Brown and described such payment as a "full settlement." Plaintiff computed and paid inheritance taxes on the estate of Norman Newman Brown as though the \$31,500 had passed to Mary Johnston Brown by dissent. Defendant, however, calculated the taxes solely in accordance with the will of Norman Newman Brown and assessed additional inheritance taxes. Plaintiff paid the additional taxes under protest and filed the present action to recover them.

Both parties moved for summary judgment. After setting out the undisputed facts, Judge Walker concluded as a matter of law that there had been no valid dissent by Mary Johnston Brown to her husband's will because her dissent had not been approved by the Clerk of Superior Court as required by G.S. 30-1(c). He further concluded that approval of the annual account by the Clerk did not constitute approval of the dissent and that the judgment *nunc pro tunc* was ineffective to establish the dissent. Consequently, the \$31,500 payment to Mary Johnston Brown by plaintiff was not a transfer by intestacy pursuant to a valid dissent, and defendant was required by G.S. 105-2 to compute inheritance taxes on the estate of Norman Newman Brown without regard to the settlement agreement of 17 January and solely in accordance with the provisions of his will. Plaintiff's motion for summary judgment was denied and

Greene v. Lynch, Sec. of Revenue

defendant's motion was allowed. Plaintiff appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Boylan, for defendant appellee.

Parker & West, by Gerald C. Parker, for plaintiff appellant.

WELLS, Judge.

Plaintiff assigns error to each of the court's conclusions of law. She argues first that G.S. 30-1(c) does not require approval of a dissent by the Clerk of Superior Court unless there is a dispute as to the value of the property passing to the surviving spouse under and outside the will of the deceased spouse. Plaintiff further argues that even if approval of the dissent was required in this case, both the Superior Court judgment *nunc pro tunc* and the Clerk's approval of the annual account constituted sufficient approval under G.S. 30-1(c). We do not agree.

"To establish the right to dissent, a spouse must make a timely filing pursuant to G.S. 30-2, and must show an entitlement to that right under G.S. 30-1." *In re Kirkman*, 302 N.C. 164, 166, 273 S.E. 2d 712, 714 (1981). "The right, time and manner, and effect of the filing and recording of a dissent to a will are all matters within the probate jurisdiction of the Clerk." *In re Snipes*, 45 N.C. App. 79, 81, 262 S.E. 2d 292, 294 (1980).

Although Mary Johnston Brown filed a timely notice of dissent with the Clerk pursuant to G.S. 30-2, she never established her entitlement to the right of dissent pursuant to G.S. 30-1. To do so, she was required by G.S. 30-1(c) to obtain the Clerk's approval of the value of the property passing to her under and outside her husband's will as of the date of his death. *Taylor v. Taylor*, 301 N.C. 357, 363, 271 S.E. 2d 506, 510-11 (1980); *In re Estate of Connor*, 5 N.C. App. 228, 168 S.E. 2d 245 (1969). At the time the \$31,500 payment was made to Mary Johnston Brown, no such approval had been received and Mary Johnston Brown's right of dissent had therefore not been established. The subsequent approval of the annual account by the Clerk did not establish her right of dissent because at the time the account was filed and approved, the dissent had been withdrawn and any further right to dissent had been waived.

The judgment *nunc pro tunc* was also ineffective to estab-

Greene v. Lynch, Sec. of Revenue

lish Mary Johnston Brown's right of dissent even if, as argued by plaintiff, either the Clerk or a judge of Superior Court may determine a widow's right of dissent under G.S. 30-1, because at the time of entry of the judgment *nunc pro tunc* there was no action pending in which the court could enter a valid order, the action having been voluntarily dismissed with prejudice prior to entry of that judgment. *See, Sutton v. Sutton*, 18 N.C. App. 480, 197 S.E. 2d 9 (1973). We have previously held, however, that exclusive original jurisdiction to determine the validity of a dissent by a surviving spouse to a will of a deceased spouse lies with the Clerk of Superior Court. *In re Snipes, supra*. A judge's probate jurisdiction is concurrent with the Clerk's jurisdiction only where the Clerk is disqualified or unable to act; in all other cases a judge's probate jurisdiction is appellate. *In re Estate of Adamee*, 291 N.C. 386, 398, 230 S.E. 2d 541, 549 (1976); *In re Snipes, supra*. The facts of the present case disclose no basis for the exercise of either concurrent or appellate probate jurisdiction by Judge Mills.

Without establishing Mary Johnston Brown's entitlement to the right of dissent in the manner required by G.S. 30-1, the payment to Brown of \$31,500 from the estate of her husband did not constitute a transfer by intestacy pursuant to a valid dissent. G.S. 105-2(1) provides for the imposition of inheritance taxes upon transfers "by will or by the intestate laws of this State. ..." The statute makes no provision for assessment of inheritance taxes on the basis of settlement or compromise agreements. As no property was transferred from the estate of Norman Newman Brown by intestacy pursuant to a valid dissent, defendant was required by statute to compute inheritance taxes on the estate of Norman Newman Brown solely in accordance with the terms of his will even though his surviving spouse received a larger share of the estate than provided for her in the will pursuant to her settlement agreement with plaintiff. *See, Pulliam v. Thrash*, 245 N.C. 636, 97 S.E. 2d 253 (1957); *In re McCoy*, 39 N.C. App. 52, 249 S.E. 2d 473 (1978), *disc. rev. denied*, 296 N.C. 585, 254 S.E. 2d 36 (1979).

The judgment below is

Affirmed.

Judges VAUGHN and BECTON concur.

Hill v. Smith

HERBERT MCKINLEY HILL AND WIFE, EDNA BYRD HILL, PLAINTIFFS AND
THIRD-PARTY PLAINTIFF-APPELLEES V. ESTHER SMITH, DEFENDANT-
APPELLANT V. WILLIAM H. ANDERSON AND WIFE, MARGARITA H.
ANDERSON, THIRD-PARTY DEFENDANTS

No. 8018DC719

(Filed 5 May 1981)

Wills § 61.4; Easements § 13— spouse's dissent from will – effect of election – land occupied under license

The trial court properly entered an order of summary ejectment against defendant who had occupied the land in question for 55 years since defendant accepted a check representing the amount of a bequest to her under the will of her husband; pursuant to the terms of the will, defendant was given no interest in the land in question; by electing to take under the will, defendant was precluded from dissenting from the will; defendant therefore had no claim to the property in question which had been owned by her husband during his life; a letter written by a stockholder in the company which purchased the property in question informing defendant that she had the company's permission to occupy the house and have a garden on two and one-half acres surrounding the house, but that no deed to the property could be furnished her, created a gratuitous license for defendant to use the property; and the license, in absence of the consent of plaintiffs who purchased the land in question, did not survive the transfer of ownership of the property by the licensor.

APPEAL by defendant from *Alexander-Ralston, Judge*. Order entered 11 April 1980 in District Court, GUILFORD County. Heard in the Court of Appeals 10 February 1981.

Plaintiffs, Mr. and Mrs. Hill, filed an action for summary ejectment alleging that defendant, Esther Smith, was unlawfully living on property within a 28-acre tract owned by the plaintiffs. Hearing the case without a jury, the trial judge made findings of fact and issued an order based on those findings that "Esther Smith has no right of ownership and no right to reside on the above-mentioned twenty-eight acres of land . . . and is hereby ordered to remove herself from the said land in question. . . ." From that order, defendant appeals.

The facts in this case are not in dispute and have been stipulated to by the parties. Defendant Esther Smith was born in 1894 and presently is eighty-six years old. In 1913, Ms. Smith married James Lea but subsequently, the two separated. Thirteen years later in 1926, Ms. Smith went through a marriage ceremony with W.S. (Silas) Smith. At the time of this marriage

Hill v. Smith

ceremony, Silas Smith was record title owner of twenty-eight acres of land in Guilford County which remained in his name until his death.

In 1959 upon the advice of her attorney, Roy M. Booth, Ms. Smith instituted an action in Guilford County Superior Court requesting an absolute divorce from her first husband, James Lea. Ms. Smith was advised to do this in order to be eligible for Social Security benefits. In response to an interrogatory in this present action, however, Ms. Smith answered that in 1920 she was served with "what [she] thought were divorce papers from James A. Lea," but that she was no longer in possession of the papers, nor could she remember the county or state from which the papers came. Prior to the 1959 divorce from Lea, Ms. Smith and Silas Smith were advised by Attorney Booth to remarry once the divorce from Lea was completed, but the two never went through a second marriage ceremony.

In 1961, Silas Smith died testate. In his Last Will and Testament, Silas Smith bequeathed "\$300 to go to Esther Smith," and the remainder of his estate to his son. Within the proper time for filing, Ms. Smith filed a widow's dissent to the Will of Silas Smith, and initiated a special proceeding to recover her widow's allowance. The executrix of the estate, Mamie R. Harris (Silas Smith's sister), answered Ms. Smith's petition denying that Ms. Smith was Silas Smith's widow and requesting the Clerk of Superior Court to strike the dissent. After a hearing, the Clerk entered a judgment finding that Esther Smith was never validly married to Silas Smith and therefore was not entitled to a widow's allowance or to dissent from the Will. Through her attorney, Roy Booth, Ms. Smith filed a notice of appeal in Superior Court but never processed that appeal. On 26 June 1967, some five years after the initiation of the appeal, Ms. Smith withdrew her appeal.

While her appeal was still pending in 1963, however, Ms. Smith, through her attorney, filed a complaint against the Estate of Silas Smith alleging that she had rendered valuable services during the thirty-five years she had lived with Silas Smith, and seeking \$5,400 for those services rendered. In 1966, a voluntary nonsuit was entered in this action dismissing this *quantum meruit* claim. On 30 November 1966, a check for \$262 was delivered to and accepted by Ms. Smith representing the

Hill v. Smith

\$300 bequest less estate taxes made to her under the Will of Silas Smith. Prior to this time, she had steadfastly refused to take the \$300 left to her under the Will.

Before Ms. Smith withdrew her appeal in 1967, the twenty-eight acres of land were purchased from the Estate of Silas Smith by BOFA, Incorporated in which Roy Booth, Ms. Smith's attorney, was a principal shareholder. After this purchase, on 27 January 1967 Booth wrote Ms. Smith a letter stating in pertinent part:

In order to keep you from being thrown out of your home, I had a Corporation, which I have an interest in, known as BOFA, Inc., buy the real estate from the heirs and the real estate is now owned by this Corporation. As I explained to you, I got permission for you to occupy the house and two one-half [sic] acres, which will give you the right to have a garden and this is all I could possibly do to help you with your troubles.

.

I cannot furnish you with a deed as there has been no indication as to the two-one-half acres that you are to have the privilege of living on, and you will simply have to take my word for the fact that as long as you want to you can live in the house and use the two-one-half acres surrounding the house for your garden. . . .

When your husband died, the Will, which was probated, gave you only \$300.00. We filed a Dissent to the Will on your behalf and attempted to prove that you were the wife of Silas Smith, and Mr. Shore, our Clerk of Court, heard the evidence, and in view of the fact that you had filed a divorce action saying that another man was your husband, Mr. Shore ruled that you were not the wife of Silas Smith, and could therefore not dissent from his Will. You can understand why he made this ruling based on the allegations in the complaint filed in the divorce case. The entire matter fell through because you and Silas did not get married again after the divorce like we understood that you would. I know he got sick and died right afterwards, but I thought he was going to marry you the very next week the divorce was granted. Anyway, the evidence was such that we could

Hill v. Smith

not contest the Will or do anything about it.

On 9 November 1967, BOFA, Inc. conveyed the property to Mr. and Mrs. William H. Anderson by warranty deed. Four months later on 27 February 1968, the property was conveyed by deed to the plaintiff-appellees in this action, Mr. and Mrs. Herbert Hill. In 1976, plaintiffs brought this action for summary ejectment. Defendant Ms. Smith presently lives on two and one half acres of the land and at this writing has lived there continuously for the past fifty-five years.

O'Connor, Speckhard & Speckhard, by Donald K. Speckhard, for defendant appellant.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Chester C. Davis, for plaintiff appellee.

BECTON, Judge.

The central issue presented on appeal is: whether the trial judge, based on the stipulated findings of fact, properly concluded that the defendant, Esther Smith, was willfully and unlawfully in possession of land owned by the plaintiffs, Mr. and Mrs. Herbert M. Hill. The scope of our review is to determine whether the findings of fact fairly and reasonably support the conclusions of law reached by the trial judge.

Ms. Smith's main objection in her four assignments of error focuses on the trial judge's conclusion that the Clerk of Superior Court of Guilford County had subject matter jurisdiction to hear and determine the validity of her marriage to Silas Smith and therefore her right to dissent from his Will. Ms. Smith argues (1) that the Clerk's jurisdiction is narrowly limited to establishing a spouse's right to dissent based solely upon a mere mathematical determination of the value of the property passing to the surviving spouse under the Will and outside the Will; (2) that, under G.S. 1-174, issues of fact joined before the Clerk must be transferred to the Superior Court for final determination; (3) that the question of the validity of her marriage to Silas Smith was an issue of fact which should have been, but was not, transferred to the Superior Court; (4) that therefore, the Clerk had no subject matter jurisdiction to decide her right to dissent; (5) that absent proper subject matter jurisdiction, the Clerk could not properly rule on the validity of her marriage to Silas Smith; and (6) that the trial judge, in this summary

Hill v. Smith

ejection proceeding, could not conclude as a matter of law that the Clerk had jurisdiction, and further, could not conclude that she was unlawfully on plaintiffs' property.

Based on the stipulated facts, however, this argument raises questions about the Clerk's probate jurisdiction which we need not decide today. Even if we were to assume *arguendo* that the Clerk did not have subject matter jurisdiction to strike Esther Smith's dissent, the findings of fact stipulated to by the parties would still support the trial judge's conclusion that she has no right, title or interest in any of the real property now owned by the plaintiffs — Mr. and Mrs. Hill. The parties to this summary ejection proceeding stipulated that "on November 30, 1966, the Clerk of Superior Court of Guilford County delivered to Esther Smith a check in the sum of \$262.20, the same representing the \$300.00 bequest less pro rata estate taxes and Clerk's commission." This refers to the bequest made to Ms. Smith under the Will of Silas Smith in which he bequeathed "\$300.00 to go to Esther Smith" without reference to her as his wife. It is a common principle of law in North Carolina that a surviving spouse must elect between taking under a Will and dissenting from the Will. The spouse cannot do both; the election of one precludes the other. *In re Estate of Loftin*, 21 N.C. App. 627, 205 S.E. 2d 574, *aff'd* 285 N.C. 717, 208 S.E. 2d 670 (1974); *see also Gomer v. Askew*, 242 N.C. 547, 89 S.E. 2d 117 (1955). In *In re Loftin*, the petitioner wife was estopped to dissent from her deceased husband's Will when she accepted the \$5,000 bequest and life estate in the house given to her under the terms of the Will. The court pointed out, "[h]aving accepted benefits [under the Will] petitioner may not repudiate the Will and take her intestate share." 21 N.C. App. at 631, 205 S.E. 2d at 576. Given the stipulated fact that Ms. Smith accepted her bequest under the Will of Silas Smith, even if she were his lawful wife, she cannot now claim a right still in existence to dissent from that Will. By waiving her right to dissent, Ms. Smith has no claim to the property in question. The trial judge's conclusion of law that Ms. Smith is unlawfully in possession of plaintiff-appellee's land is supported, therefore, by the findings of fact stipulated to by the parties.

Ms. Smith's alternative claim is that the letter from Roy M. Booth dated 27 January 1967 conveyed a life estate in the house and two and one-half acres of land to her. A careful review of the

Yelverton v. Furniture Co.

letter does not support this contention. The letter — written by Roy M. Booth in his capacity as a stockholder in BOFA, Inc. which purchased the entire twenty-eight acres of land from the estate of Silas Smith — specifically informed Ms. Smith that she had the company's permission to occupy the house and have a garden on the two and one-half acres, but that no deed to the property could be furnished to her. At the very most, the letter created a gratuitous license for Esther Smith to use the property. It is well established that a license does not create a property interest in land, and it is equally settled that a license is revocable at the will of the licensor. *Sanders v. Wilkerson*, 285 N.C. 215, 204 S.E. 2d 17 (1974); 1A, Thompson on Real Property, §223 (1980); Webster, Real Estate Law in North Carolina, §§310, 312 (1971). Additionally, without the consent of the new owners, licenses generally do not survive the transfer of ownership of the property by the licensor. 1A Thompson, *supra*, at §216; Webster, *supra*, at §312.

In the case at bar, Esther Smith was granted permission to remain on the property impliedly for as long as BOFA, Inc. owned the property. This she did. Once the property was sold, Esther Smith's privilege to live on the property granted by BOFA came to an end. Esther Smith had no enforceable property right in the land in question. The trial judge therefore was correct in all respects, and her order is hereby

Affirmed.

Judge VAUGHN and Judge WELLS concur.

STEVEN R. YELVERTON EMPLOYEE-PLAINTIFF v. KEMP FURNITURE
COMPANY (KEMP FURNITURE INDUSTRIES, INC.), EMPLOYER-DEFENDANT AND
AMERICAN MUTUAL INSURANCE COMPANY, INSURANCE CARRIER-
DEFENDANT

No. 8010IC959

(Filed 5 May 1981)

1. Master and Servant § 94.3— workers' compensation — hearing by full commission — no hearing de novo

On appeal to the full Industrial Commission, plaintiff was not entitled to a hearing and consideration of his case de novo since plaintiff at no time filed

Yelverton v. Furniture Co.

a written request, supported by affidavit, setting forth the grounds for a hearing *de novo*.

2. Master and Servant § 59—workers' compensation—assault by fellow employee—no compensable accident

Evidence was sufficient to support the finding of the Industrial Commission that an accident to plaintiff did not arise out of and in the course of his employment where such evidence tended to show that plaintiff left his work area with the expressed purpose of going some sixty feet away to the end of an assembly line to harass a fellow employee; he was not going to the end of the line to accomplish any purpose connected with his employment; plaintiff threatened to "get" his fellow employee, called him "Boy," and spit in the employee's face; plaintiff then picked up a wooden post and held it over his shoulder in a threatening manner; and plaintiff's fellow employee then picked up a post and struck plaintiff with it when plaintiff came toward him.

APPEAL by plaintiff from Order of the North Carolina Industrial Commission entered 12 June 1980. Heard in the Court of Appeals 8 April 1981.

This is an appeal by plaintiff employee from an award of the North Carolina Industrial Commission finding and concluding as a matter of law that plaintiff appellant did not sustain an injury by accident arising out of and in the course of his employment. A deputy commissioner previously had heard the evidence offered by the parties and made findings and conclusions which were adopted and affirmed by the Full Commission. Plaintiff thereafter appealed to this Court from the Full Commission's award.

Robert S. Cahoon for plaintiff appellant.

Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for defendant appellees.

HILL, Judge.

[1] Plaintiff appellant first assigns as error the Full Commission's denial of his request for a hearing and consideration of his case *de novo*.

The North Carolina Worker's Compensation Act provides:

If application is made to the Commission . . . the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award: . . . G.S. 97-85.

Yelverton v. Furniture Co.

An appeal to the Full Commission does not automatically entitle the parties to a hearing *de novo* before the Full Commission. Rather, it is entirely proper for the Full Commission "to reconsider the evidence taken before the hearing commissioner without hearing the witnesses again *viva voce* and give it such consideration as they may deem proper." *Maley v. Furniture Co.*, 214 N.C. 589, 593, 200 S.E. 438 (1939).

The rules of the Commission make adequate provision for motions to rehear. Rule XXI(6) — Rules of the Industrial Commission provides,

Ruling on a motion for a new hearing to take additional evidence will be governed by the general law of the state for the granting of new trials on the grounds of newly discovered evidence. Such motion must be written, supported by affidavit, and may be argued before the Full Commission at time of hearing on appeal.

At no time has the plaintiff filed a written request, supported by affidavit, setting forth the grounds for a hearing *de novo*. The Full Commission in its opinion and award recites that neither the record nor argument of counsel revealed any support for such a request and denied the request. In the absence of abuse of discretion by the Full Commission, the denial of plaintiff's request for a hearing *de novo* is not reviewable.

We note that in its Opinion and Award the Full Commission did more than dismiss the action for failure to observe the rules:

The undersigned have reviewed the record, have considered the exceptions, and have read various memoranda of law supplied by counsel for both sides. In addition, due consideration has been given to oral argument by counsel for both sides when the matter was before the Full Commission.

* * * * *

The undersigned are of the opinion that competent evidence is in the record to support the findings of fact, conclusions of law, and the Opinion and Award as filed by Deputy Commissioner Rush.

We find no merit to plaintiff's first assignment of error.

Yelverton v. Furniture Co.

[2] Appellant argues in his next assignment of error that the Commission erred by finding and concluding that the findings of fact, conclusions of law, and the Opinion and Award filed by Deputy Commissioner Rush are supported by competent evidence. We do not agree with plaintiff.

An examination of the record reveals evidence that the plaintiff left his work station and went to the end of the line to harass Ricky Vick about some work that Vick had "messed up" a week or so before. At midnight, the workmen allowed the assembly line to clear up all work whereupon they took their break. During the break, Ricky Vick requested plaintiff not to continue to come down to the end of the line and "get on him." As the workmen went back to the assembly line after the midnight break, the plaintiff told a fellow worker that he was going to go back down to the end of the line and harass Ricky Vick some more. The plaintiff then left his assigned work station, walked some sixty feet to the end of the line where he started harassing Ricky Vick about money owed, threatening to "get him", calling him "Boy", and spitting in Ricky Vick's face. Thereafter, plaintiff picked up a wooden post and held it over his shoulder in a threatening manner. Ricky Vick then picked up a post and when plaintiff came toward him, Vick struck plaintiff with the post.

The Commission found from the evidence that the accident to the plaintiff did not arise out of and in the course of his employment. The plaintiff left his work area with the expressed purpose of going some sixty feet away to the end of the assembly line to harass Ricky Vick. He was not going to the end of the line to accomplish any purpose connected with his employment at Kemp Furniture Company. This is not a situation in which an unintentional dispute suddenly arose between two workmen over the manner in which they were to perform their work for their employer.

Findings of Fact made by the Industrial Commission are binding on appeal when supported by any competent evidence, even though there be evidence that would have supported a contrary finding. G.S. 97-86; *Petree v. Power Co.*, 268 N.C. 419, 420, 150 S.E. 2d 749 (1966); *Benfield v. Troutman*, 17 N.C. App. 572, 574, 195 S.E. 2d 75, *cert. denied*, 283 N.C. 392 (1973). The Commission is the judge of the credibility of witnesses and the

Lyons v. Morrow, Sec. of Human Resources

weight to be given to their testimony. While there is evidence that would have justified different findings of fact by the Commission — findings which would have supported conclusions of law favorable to the plaintiff appellant — it is well settled that finding facts is one of the primary duties of the Industrial Commission, and the Commission is the sole fact-finding agency in cases in which it has jurisdiction. *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 127, 162 S.E. 2d 619 (1968), citing *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439 (1958). We hold that the Commission's findings, conclusions and award are supported by competent evidence. Plaintiff's assignment of error is overruled.

Finally, plaintiff contends the Full Commission erred in adopting and affirming the Opinion and Award of Deputy Commissioner Rush. The facts found by the Deputy Commissioner were adopted by the Full Commission as its own. Under G.S. 97-86, this award becomes conclusive and binding as to all questions of fact. The facts support the conclusions, and the conclusions support the Award and Opinion.

The Award and Opinion of the Full Commission is
Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

BETTY MAE LYONS, PLAINTIFF v. DR. SARAH T. MORROW, SECRETARY,
NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, AND ROBERT H.
WARD, DIRECTOR, DIVISION OF SOCIAL SERVICES, NORTH CAROLINA DEPART-
MENT OF HUMAN RESOURCES AND W.W. MULLENS, DIRECTOR, GRANVILLE
COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

No. 809SC922

(Filed 5 May 1981)

**Social Security and Public Welfare § 1—AFDC benefits—reduction for food stamps
purchased by stepfather**

The Director of the State Division of Social Services erred in finding that AFDC benefits paid to plaintiff were properly reduced by \$87 a month because of food contributions by the stepfather of plaintiff's children on the basis of a letter from the stepfather stating that he did not contribute to the

Lyons v. Morrow, Sec. of Human Resources

support of the children but thereafter indicating that he contributed "food," since the letter was so contradictory and incomplete that it was impossible to determine therefrom whether the stepfather's food contribution was regular and, if so, what portion of the children's food needs the contribution covered. Where the evidence showed that the stepfather was regularly buying all the food stamps for the children at the time plaintiff applied for the AFDC grant, the proportional amount paid for those stamps, but not their actual value, should have been considered as a contribution and included in the children's monthly budget.

APPEAL by plaintiff from *DeRamus, Judge*. Judgment entered 26 February 1980 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 6 April 1981.

During the first quarter of 1977, plaintiff was living with her three children [hereinafter the Hunter children], her husband and their child. Plaintiff's entire family was receiving food stamps, based on the income of the entire family unit.

In February 1977, plaintiff applied at the Granville County Department of Social Services [DSS] for Aid to Families with Dependent Children [AFDC] to help her support the Hunter children. Plaintiff had applied for AFDC assistance on at least one other occasion, but had been denied assistance because her husband, David Lyons, had said in response to DSS's inquiry that he could support the Hunter children. On 22 February, a DSS employee filled out a new application form for plaintiff, and under the section entitled "Income" indicated that plaintiff was receiving no support payments or contributions.

DSS sent Mr. Lyons a letter asking him to indicate whether he was making a contribution to the Hunter children (his stepchildren). In response to the question, "Do you contribute to the support of [the Hunter children]?", Lyons replied "No." The form letter further asked, "If you do contribute, please check or list below exactly what you do contribute, such as food and clothing, etc." Lyons indicated that he did contribute food, but did not answer the additional question "If you contribute food, how much?" Lyons dated his response 23 February 1977. When the response arrived at the DSS office, an employee indicated on plaintiff's application that Lyons' letter verified a contribution of food, and, using the table set forth in § 2350 (III) (E) (2) of North Carolina's AFDC Regulations, calculated the contribution's value at \$87. No investigation was made to determine the extent of Lyons' contribution, although if one had been made, it

Lyons v. Morrow, Sec. of Human Resources

would have been determined that he was buying all of the food stamps for the family. Plaintiff was declared eligible for AFDC benefits, but her monthly grant was reduced by \$87.

DSS commenced the normal review of the Hunter children's AFDC aid in August 1977. Lyons supplied the same information he had supplied in February; but, in addition, stated that his "food contribution" consisted of buying half the food stamps for the entire family. The monthly AFDC grant was then reduced for the next six-month period by the average monthly cost of that contribution (\$50).

On 6 April 1978, plaintiff requested an administrative review of DSS's denial of her request for a restoration of benefits allegedly lost from March 1977 to March 1978 (\$87 per month from March 1977 through September 1977; \$50 per month from October 1977 to March 1978). A "Fair Hearing" was conducted, and on 26 September 1978 the director of the Division of Social Services of the State Department of Human Resources held that,

Since your husband's signed statements to the Granville County Department of Social Services prior to August 1, 1977 indicated a food contribution, the Granville County Department of Social Services was correct in its inclusion of your husband's contribution of food until August 1, 1977.

The Director continued, holding that DSS erred when it considered Mr. Lyons' contribution of food stamps after 1 August 1977, and held that "no income should have been considered" for that period. Retroactive benefits were granted for the period from August 1977 through March 1978.

Plaintiff appealed the denial of benefits for March 1977 through July 1977. Both parties filed motions for summary judgment. From the trial court's grant of summary judgment in favor of defendants, plaintiff appeals.

North Carolina Legal Assistance Program, by Michael B. Sosna, for plaintiff-appellant.

Attorney General Edmisten, by Assistant Attorney General Steven Shaber, for defendant-appellees Morrow and Ward.

Watkins, Finch & Hopper, by Thomas L. Currin, for defendant-appellee Mullens.

Lyons v. Morrow, Sec. of Human Resources

HILL, Judge.

Despite counsel's effort to make it otherwise, this is a simple case. Summary judgment in defendants' favor is based on Judge DeRamus's conclusion that the decision of the Director of the Division of Social Services denying retroactive AFDC benefits to plaintiff for the period of March 1977 through July 1977 was proper and lawful. That is the only issue brought forth in the complaint and the only issue we must decide, even though counsel has stipulated that the "sole question to be determined is . . . : were defendants correct in determining that the purchase of one-half of the household's food stamp allotment by the stepfather was a contribution to the stepchildren which should be deducted in calculating their AFDC grant. . . ." The Director of the State Division of Social Services has answered that issue in the negative. Defendants have not appealed the Director's decision, and we assume that plaintiff has received retroactive benefits for the period beginning 1 August 1977.

We find that the Director's decision denying retroactive AFDC benefits to plaintiff for the period of March 1977 through July 1977 was improper. The DSS did not follow the procedure mandated in the AFDC regulations.

§ 2350(I) of the North Carolina AFDC Manual provides that unearned income such as contributions must be considered in determining the eligibility of a budget unit (the Hunter children) for AFDC assistance and the amount of payment once eligibility is established. § 2350(III) (E) (2) provides that contributions made in cash or kind on a *regular* basis are to be included in the unit's budget; i.e., subtracted from the amount of assistance granted. If a member of the budget unit receives regular contributions in the form of food, the manual requires that DSS "determine what portion of the budget unit's . . . needs the contribution covers." § 2350(III) (E) (2) (a). While DSS certainly had the right to rely on Lyons' letter of 23 February 1977, under the circumstances the letter was so contradictory and incomplete that it was impossible for DSS to meet its responsibility of determining whether Lyons' food contribution was regular and, if so, what portion of the Hunter children's food needs the contribution covered.

This case must be remanded for a determination of how much of a retroactive corrective payment must be made to

State v. Atkinson

plaintiff. § 2630, N.C. AFDC Manual. Evidence already of record shows that Lyons was regularly buying all of the food stamps for the Hunter children at the time plaintiff applied for the AFDC grant. The proportional *amount paid* for those stamps, *but not their actual value*, must be considered a contribution which should have been included in the Hunter children's monthly budget. The difference between that amount and the \$87 per month actually included in the budget should be retroactively paid to the budget unit. See 7 U.S.C. § 2016(c) as it existed in March 1977. Also see 7 U.S.C. § 2019(d) as it existed in 1977, and *Dupler v. City of Portland*, 421 F. Supp. 1314, 1318 (D. Maine 1976), both of which state only that the "value" or "benefit" of food stamps cannot be taken into account to reduce welfare benefits.

Summary judgment in defendants' favor is vacated. The case is remanded to the trial court with the direction that it remand the case to the Director of the Division of Social Services of the Department of Human Resources for action consistent with this opinion.

Vacated and Remanded.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. ROGER ATKINSON

No. 805SC1193

(Filed 5 May 1981)

1. Constitutional Law § 49— waiver of right to counsel

The trial court was not required to appoint counsel on the day of trial to represent defendant on a charge of assault with a deadly weapon where defendant had told the trial judge on several occasions, including the day of the trial itself, that he had the financial resources necessary to hire his own counsel; defendant was given adequate time to retain counsel yet failed to do so; and defendant suddenly changed his mind five minutes before the trial began and asked the court to get him a lawyer because he could no longer afford one himself.

2. Criminal Law § 99.2— no expression of opinion by trial judge

Where the trial judge denied defendant's belated request for assigned counsel and defendant persistently sought opportunities to argue with the

State v. Atkinson

court in front of the jury concerning the alleged denial of his constitutional rights, the trial judge did not express an opinion and ridicule defendant before the jury when he correctly explained to defendant and the jury the reason for his denial of assigned counsel.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 21 August 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 April 1981.

Defendant was convicted of assault with a deadly weapon and sentenced to a prison term of eight months.

Defendant was charged in a warrant with assault with a deadly weapon in violation of G.S. 14-33(b)(1) on 11 June 1980. Defendant subsequently signed a waiver of right to have assigned counsel. He was tried and convicted in the District Court. Defendant appealed his conviction to Superior Court. At his arraignment on 4 August 1980, defendant entered a plea of not guilty whereupon the court ordered that the case be set for trial on 18 August 1980. Defendant signed another waiver of right to have assigned counsel on that same day.

The case was called for trial on 19 August, but defendant told the court that he did not have an attorney. The court asked him whether he was financially able to hire an attorney, whereupon he responded that he was selling his business (a nightclub) and had the money to hire his own attorney but said he was not ready for trial that day. The court continued the case so defendant could hire an attorney but told him to be ready for trial that week. On 20 August, defendant returned to the courtroom and awaited trial all day. Finally, on 21 August, the case again came up for trial after defendant had been waiting in the courtroom for several hours. All five of the State's witnesses were present in the courtroom and ready to testify. The court again asked defendant whether he had an attorney, and defendant said he did not. Defendant then assured the court once again that he was financially able to hire his own legal counsel but requested some additional time to do so. The court agreed to continue the case for thirty minutes so defendant could call an attorney. Defendant left the courtroom but returned within the allotted time only to request another continuance of the case so he could get an attorney. The court denied this request, and the case was immediately called for trial.

State v. Atkinson

The State presented evidence which tended to show that defendant, in an attempt to collect a debt, assaulted the prosecuting witness with a gun. Defendant did not cross-examine any of the State's witnesses and did not testify or present any evidence. Neither the State nor defendant made closing arguments to the jury.

The jury found defendant guilty as charged, and defendant now appeals from the judgment entered upon that conviction.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

D. Webster Trask, for defendant appellant.

VAUGHN, Judge.

All of the assignments of error relate, to a substantial degree, to Judge Fountain's refusal, in the face of repeated requests throughout the course of the trial on 21 August 1980, to appoint an attorney to represent defendant. We hold that the judge acted properly in each instance to which defendant took exception.

[1] Defendant's primary contention is that the court was required to assign counsel for his representation on the day of the trial even though he had previously signed two waivers of this right and had told Judge Fountain on several occasions, including the very day of the trial itself, that he had the financial resources necessary to hire his own attorney. We disagree. The record in this case clearly demonstrates that defendant effectively waived his right to counsel in a knowing and voluntary manner. Despite defendant's signed waiver, Judge Fountain inquired twice about defendant's ability to get a lawyer before trial and thus indicated his willingness to assign counsel if defendant showed the requisite need. Defendant, however, insisted that he could provide counsel for himself and asked the judge for two continuances instead. Defendant was given adequate time to retain counsel yet he failed to do so. In these circumstances, Judge Fountain acted fairly and properly, and he was not required to appoint counsel when defendant suddenly changed his mind, five minutes before the trial actually began, and asked the court to get him a lawyer because he could

State v. Atkinson

no longer afford one himself when he had confirmed his financial ability to do so only thirty minutes earlier. Defendant did not meet his burden of showing sufficient facts entitling him to a withdrawal of the waiver of right to counsel, nor did he show good cause for delay, and the court correctly refused to entertain his dilatory tactics further.¹ See *State v. Smith*, 27 N.C. App. 379, 219 S.E. 2d 277 (1975); *State v. Watts*, 32 N.C. App. 753, 233 S.E. 2d 669, *review denied*, 292 N.C. 734, 235 S.E. 2d 788 (1977). See also *State v. Clark*, 33 N.C. App. 628, 235 S.E. 2d 884 (1977).

[2] Defendant also contends that the court expressed unlawful opinions and ridiculed him before the jury. The record does not support such a contention. After the court denied defendant's belated request for assigned counsel, defendant persistently sought opportunities to argue with the court, in front of the jury, concerning the alleged denial of his constitutional rights. It suffices to say that we have examined the content of Judge Fountain's statements and fail to find any error whatsoever. He correctly explained to defendant and the jury the reason for his denial of assigned counsel in a legitimate effort to prevent confusion and promote the rendering of an impartial verdict. We, therefore, overrule this assignment of error.

After careful review, we also overrule the remaining assignments of error, in which defendant contends that the judge promised to examine the potential jurors on his behalf but failed to do so effectively and improperly allowed the State's objection to the record on appeal. Again, we hold that Judge Fountain acted fairly and well within the bounds of reasoned discretion in each instance, and these assignments of error are patently without merit.

In conclusion, defendant is not entitled to a new trial as he was duly convicted in a fair and impartial proceeding upon a record which fails to disclose any prejudicial error.

¹In his brief, defendant contends that his waiver of right to counsel was conditional and that he told Judge Fountain that he would be able to afford his own counsel only if a business transaction, involving the sale of his nightclub, was completed. We reject this argument. Defendant signed a waiver form which was absolute on its face, and the record does not show that defendant informed the court of the alleged condition at any time *before* trial. Rather, the record supports the conclusion that defendant raised this matter for the first time at the hearing held to settle the record on appeal after his conviction.

State v. Black

No error.

Judges CLARK and WELLS concur.

STATE OF NORTH CAROLINA v. PHYLLIS VANESSA BLACK

No. 8020SC1117

(Filed 5 May 1981)

Constitutional Law § 40—right to counsel—failure to find counsel made available to defendant

There was no merit to the State's argument that, since defendant was not imprisoned but rather was given a suspended sentence, she was not entitled to counsel at her trial and, since she was provided with the opportunity to have a lawyer at the time she faced imprisonment at the probation revocation hearing, no error was committed; therefore, the case must be remanded for a hearing to determine whether defendant was represented by counsel at her trial, and, if not, whether she was indigent and entitled to have counsel appointed, or whether she waived the right to have assigned counsel.

APPEAL by defendant from *Britt (Samuel E.)*, Judge. Judgment entered 22 September 1980 in Superior Court, UNION County. Heard in the Court of Appeals 31 March 1981.

Defendant pleaded guilty to shoplifting on 24 November 1975 and was sentenced to six months imprisonment. This sentence was suspended, and she was fined \$100 and placed on probation for twelve months. Two of the conditions of probation were that she not change her residence without written consent of her probation officer, and that she pay her fine of \$100 and costs of \$25. The order expressly provided that at any time within the period of her probation, the trial court could impose the judgment and sentence it could have imposed originally.

On 12 May 1976 a warrant issued for the defendant for failure to comply with the condition of probation requiring her to pay the fine and costs. This warrant was returned unserved because defendant had moved out of Union County and could not be located. A Violation Report was filed 6 August 1980, and on 11 August 1980 defendant waived her right to have assigned counsel. At the probation revocation hearing the court revoked

State v. Black

the suspension of her earlier sentence and ordered that she be imprisoned for six months. Defendant appealed this order to Superior Court and following another waiver of counsel and hearing, her probation was revoked and the suspended sentence activated. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Joan H. Byers, for the State.

Robert L. Huffman for defendant appellant.

ARNOLD, Judge.

Defendant contends the trial court erred by failing to remand the matter to the district court for a new trial due to the failure of the district court judge who initially heard the case either to appoint counsel for the defendant or to have defendant execute a waiver of right to have assigned counsel.

The record does not indicate whether defendant was represented by retained counsel, whether she executed an affidavit of indigency and was given or refused court-appointed counsel, or whether she waived the right to have assigned counsel.

The State argues that the burden of proof is on the defendant to prove her inability to employ counsel at the time she was convicted, and that since defendant did not meet this burden at the trial level the conviction should be presumed valid and defendant's right to appeal deemed waived. In support of its argument the State relies on this Court's decisions in *State v. Atkinson*, 39 N.C. App. 575, 251 S.E. 2d 677 (1979), and *State v. Vincent*, 35 N.C. App. 369, 241 S.E. 2d 390 (1978). Both of these cases involved defendants who were challenging the use of prior uncounseled convictions for impeachment purposes at their current trials. We are unpersuaded that the same principles apply to a case such as this one, where defendant is challenging a conviction for which she is currently being punished rather than the collateral use of a past conviction. We find therefore that this issue is properly before the Court, and, accordingly, we now address the issue of whether she was entitled to counsel at her trial.

The Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance

State v. Black

of appointed counsel in his defense. *Scott v. Illinois*, 440 U.S. 367, 59 L. Ed. 2d 383, 99 S.Ct. 1158 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972).

The State argues that as the defendant was not imprisoned but rather was given a suspended sentence, she was not entitled to counsel at her trial and, since she was provided with the opportunity to have a lawyer at the time she faced imprisonment at the probation revocation hearing, no error was committed. Reluctantly, we must disagree. *Scott v. Illinois, supra*, did not hold that an attorney was not required where a sentence was suspended. Instead it held that appointment of counsel was not required in every case in which imprisonment, though not imposed, was an authorized penalty. While *Scott* appears to hold that actual imprisonment is the constitutional line for the appointment of counsel, rather than just the imposition of a sentence of imprisonment subsequently suspended, that is not the issue presented in the case *sub judice*. Defendant has actually been imprisoned as a result of her probation revocation and the activation of her suspended sentence.

The United States Supreme Court recently held in *Baldasar v. Illinois*, 446 U.S. 222, 64 L.Ed. 2d 169, 100 S.Ct. 1585 (1980), that though a prior uncounseled conviction may be valid because the defendant was only fined and sentenced to one year's probation, it could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction. The principles in support of this holding apply even more strongly to the present defendant's case. Her conviction is not being used collaterally, but directly to impose a term of imprisonment. If she was indigent and not provided with counsel at her trial, the fact that she was afforded the opportunity to have counsel at her probation revocation hearing could not undo the damage previously done.

Accordingly, this case is remanded for a hearing in order to determine whether defendant was represented by counsel at her trial, and, if not, whether she was indigent and entitled to have counsel appointed, or whether she waived the right to have assigned counsel. If defendant was not represented by counsel and she can establish her indigency at the time of her trial, then she is entitled to a new trial. If at this hearing it is found that she was represented by counsel or waived her right

Nickels v. Nickels

to such representation, or, if she cannot establish that she was an indigent at the time of her trial, the order of the trial court is affirmed since we have found no other errors.

Remanded.

Judges HEDRICK and WEBB concur.

VIRGINIA WRIGHT NICKELS v. DEWEY NICKELS

No. 8021DC899

(Filed 5 May 1981)

Judgments § 21.1; Rules of Civil Procedure § 60.1— motion to set aside consent judgment – reasonable time – failure to show absence of consent

Defendant's motion 23 months after a consent judgment was entered to set aside the judgment on the ground it was void because defendant did not consent thereto was not made within a "reasonable time" as required by G.S. 1A-1, Rule 60(b)(4), and the trial court thus had no authority to entertain and allow the motion, where defendant was present when most of the terms of the judgment were discussed in open court; within six months after the judgment was entered, defendant read a copy of the judgment and argued with his attorney about the alimony provision therein; and defendant fully complied with terms of the consent judgment with respect to the transfer of title to two mobile homes and two vehicles and the disposition of certain real estate owned by the parties as tenants by the entirety. Furthermore, the evidence was insufficient to rebut the presumption that defendant's attorney, who signed the consent judgment, did not have the authority to do so and that the judgment was therefore void because it had not been signed by defendant.

APPEAL by plaintiff from *Keiger, Judge*. Order entered 17 April 1980 in District Court, FORSYTH County. Heard in the Court of Appeals 2 April 1981.

This civil proceeding was initiated by plaintiff in a complaint dated 9 September 1977 seeking alimony, custody of the minor children born of her marriage to defendant, and child support. When the case came on for hearing before Judge Alexander on 16 November 1977, settlement was discussed and agreed upon by the parties, and thereafter, on 12 January 1978, a consent judgment was executed and signed by Judge Alexander, plaintiff, the attorney for plaintiff, and the attorney for

Nickels v. Nickels

defendant. Subsequently, on 21 May 1979, in a separate proceeding, defendant was granted an absolute divorce from plaintiff on the basis of one year's separation.

On 4 January 1980, defendant filed a motion seeking to set aside the 12 January 1978 consent judgment on the grounds that the consent judgment was entered without his consent. After a hearing, the court made the following pertinent findings:

[P]rior to the execution of said judgment, the defendant was represented by Chester C. Davis and the plaintiff was represented by Rebecca L. Connelly; that on November 16, 1977, said case was scheduled for hearing; ... that on the date of the hearing the said Chester C. Davis, with the consent of the defendant, made an offer of settlement to the said Rebecca L. Connelly; that said offer of settlement was accepted by the said Rebecca L. Connelly and most of said offer was relayed in open Court to the Honorable Abner Alexander; ... the consent judgment in question was drawn by the said Rebecca L. Connelly, signed by the plaintiff and Rebecca L. Connelly and forwarded to Chester C. Davis; that Chester C. Davis notified the defendant ... and requested the defendant to come to his office to review said consent judgment; that some of the provisions of the consent judgment were never discussed with the defendant or agreed to by the defendant prior to the execution of the consent judgment ... ; that in December, 1977, Chester C. Davis related to the Honorable Abner Alexander that his client had not reviewed the proposed consent judgment; that the attorney was unable to contact said client because said client was probably out of the country on business; that thereafter, on or about January 12, 1978, said attorney relayed the same information ... and the Honorable Abner Alexander stated to said attorney that he would enter the judgment without the consent of the defendant and he would enter it as "his," the Court's, judgment; ...

The court then "found" that defendant had neither given his "unqualified consent" to execute the consent judgment at the time of its entry, nor had defendant given his attorney, Davis, the authority to do so. The court concluded that the 12 January 1978 consent judgment was "void," and that defendant had

Nickels v. Nickels

shown "just reason for justifying release from operation of the consent judgment. . . ." From an order setting aside and relieving defendant from the 12 January 1978 consent judgment, plaintiff appealed.

Westmoreland, Sawyer & Miller, by Gordon A. Miller, for the plaintiff appellant.

Morrow & Reavis, by Larry G. Reavis and John F. Morrow, for the defendant appellee.

HEDRICK, Judge.

Defendant's "motion to set aside consent judgment" does not contain the rule number pursuant to which the motion was made as contemplated by Rule 6 of the General Rules of Practice for the Superior and District Courts, nor does the order of Judge Keiger granting the motion specify the rule number; however, Judge Keiger declared the consent judgment entered 12 January 1978 by Judge Alexander to be "void." We assume, therefore, that defendant's motion was made and allowed pursuant to G.S. § 1A-1, Rule 60(b)(4), which in pertinent part provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (4) The judgment is void; . . ."

While motions pursuant to subsections (1), (2), and (3) of Rule 60(b) must be made "not more than one year after the judgment, order, or proceeding was entered or taken," as well as being made "within a reasonable time," motions pursuant to subsections (4), (5), and (6) simply "shall be made within a reasonable time." G.S. § 1A-1, Rule 60(b); *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E. 2d 446 (1971). What constitutes a "reasonable time" depends upon the circumstances of the individual case. *McGinnis v. Robinson*, 43 N.C. App. 1, 258 S.E. 2d 84 (1979); see also 46 Am. Jur. 2d Judgments § 704.

We believe the record in the present case discloses that defendant's motion to "set aside" the consent judgment was not made within a reasonable time. The consent judgment was entered on 12 January 1978. Defendant was present when "most" of the terms of the consent judgment were discussed in open court with Judge Alexander on 16 November 1977. He had told his attorney, Davis, to "do what you have to" because "I want to get it over with." Davis testified that after the consent

Nickels v. Nickels

judgment had been signed "but within six months after November of 1977, and probably less time than that . . .," he and defendant "on at least three separate occasions, got into rather heated arguments about the alimony provision," during which defendant told Davis "he did not agree to the alimony provision . . ." Davis then testified he told defendant, "[T]hat is not true. You did agree to it. It's over with." Defendant himself testified that he saw and read a copy of the consent judgment in May 1978.

In addition, defendant fully complied with the terms of the consent judgment with respect to the transfer of title to two mobile homes and two vehicles, the removal of four "junk cars" from a lot owned by plaintiff, the payment of attorney's fees, and the payment of child support. Defendant also signed a disbursement statement dated 8 June 1979 which evidenced complete compliance with the detailed provisions under the consent judgment for the disposition of the Mocksville real estate owned by the parties as tenants by the entirety.

Defendant retained Davis as his attorney until 2 January 1980. Defendant then, with new counsel, filed his motion to "set aside" the consent judgment on 4 January 1980, some twenty-three months after the consent judgment was entered. Under these circumstances, we are of the opinion that defendant waited an unreasonable period of time before hiring a new attorney and filing a motion to be relieved from the consent judgment, and thus Judge Keiger had no authority to entertain and allow the motion, and his order granting relief pursuant to G.S. § 1A-1, Rule 60(b)(4) must be vacated.

Even had the motion to "set aside" the consent judgment been made within a reasonable time, we are of the opinion that Judge Keiger erred in declaring the judgment void. A consent judgment cannot be set aside except upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake, and the burden of proof is upon the party attacking the judgment. *In Re Johnson*, 277 N.C. 688, 178 S.E. 2d 470 (1971); *Blankenship v. Price*, 27 N.C. App. 20, 217 S.E. 2d 709 (1975). Furthermore, this Court, in *Haddock v. Waters*, 19 N.C. App. 81, 198 S.E. 2d 21 (1973), stated as follows:

While better practice dictates that parties and their attorneys sign a consent judgment, signatures of parties or

State v. Glenn

their attorneys is not necessary if consent is made to appear. *Stanley v. Cox*, 253 N.C. 620, 117 S.E. 2d 826 (1961). In *Gardiner v. May*, 172 N.C. 192, 196, 89 S.E. 955, 957 (1916), the court said: "A judgment entered of record, whether *in invitum* or by consent, is presumed to be regular, and an attorney who consented to it is presumed to have acted in good faith and to have had the necessary authority from his client and not to have betrayed his confidence, or to have sacrificed his right." The authority of a party's attorney is presumed when he professes to represent the party. ... [Citations omitted.]

Id. at 83-84, 198 S.E. 2d at 23. See also *Ledford v. Ledford*, 229 N.C. 373, 49 S.E. 2d 794 (1948). In our view, the evidence in the present case, and the findings made thereon by Judge Keiger, are insufficient to rebut the presumptions discussed in *Had-dock v. Waters*, *Supra*.

The order appealed from is

Vacated.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. RAYMOND GLENN, III

No. 8013SC1104

(Filed 5 May 1981)

1. Criminal Law § 26.5— two offenses arising from one transaction – no double jeopardy

Defendant was not subjected to double jeopardy where he was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious injury and attempt to commit first degree rape, though both crimes arose from the same series of events, since each offense charged included an element not common to the other offense; and the State did not use exactly the same evidence to establish both offenses in that defendant had already completed an attempt to commit first degree rape when the victim temporarily escaped and ran to the front of the store where the crimes occurred, and it was only after this when defendant caught the victim, told her he would kill her, and stabbed her in the throat that evidence arose to support a conviction of an assault with a deadly weapon with intent to kill inflicting serious injury.

State v. Glenn

2. Criminal Law § 75.9— defendant's spontaneous statement in police custody — admissibility

The trial court did not err in refusing to grant defendant's motion to suppress a statement made by him while in police custody where two officers were in the police car at the time defendant made his statement; both testified that they did not question defendant about the incident, but that he spontaneously stated, "I did not kill that woman. I just went in to find out where [the store owner] was"; the only other evidence on voir dire was defendant's testimony that he was questioned, threatened with an overnight lockup in jail if he refused to talk, and promised freedom by the officers if he would answer their questions; and the evidence was undisputed that defendant had previously conferred with an attorney and that he had been advised to speak with no one about the incident.

3. Assault and Battery § 16.1— instruction on lesser offense not required

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was not entitled to an instruction on assault with a deadly weapon inflicting serious injury since the State's evidence tended to show that defendant stated his intention to kill his victim and then brutally stabbed her in the throat in such a manner as to establish a readily apparent intent to kill; defendant's evidence tended to establish that he was not even at the crime scene on the day of the incident; and there was therefore no evidence to support an instruction on the lesser offense of assault with a deadly weapon inflicting serious injury.

APPEAL by defendant from *Braswell, Judge*. Judgments entered 16 July 1980 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 13 March 1981.

The defendant, Raymond Glenn, III, was charged in separate indictments with (1) assault with a deadly weapon with intent to kill inflicting serious injury; and (2) attempt to commit first-degree rape. He was convicted by a jury as charged and appeals from judgments imposing consecutive prison terms.

The State's evidence tended to show that Wanda Gail Jolly went to her job in a Tabor City shoe store on the morning of Easter Monday, 7 April 1980. At about 8:30, defendant entered the store and asked Mrs. Jolly when her employer would arrive at the store. She responded to defendant that her employer would get to work around 9:00 o'clock. A few minutes later Mrs. Jolly noticed that defendant had still not left the store, so she approached him to determine if he wished to buy a pair of shoes. He grabbed her, put his hand over her mouth, and dragged her into an office in the rear of the store. He informed Mrs. Jolly of his intention to have sexual relations with her. He then pulled a knife and stabbed Mrs. Jolly. She escaped from defendant and

State v. Glenn

ran toward the front of the store, but defendant caught her and stabbed her several more times. At one point he told Mrs. Jolly he was going to kill her and stabbed her in the throat, working the knife downward, then using his finger to pry the wound even farther open. At this point she became limp and pretended to be dead, whereupon defendant left the store. When Mrs. Jolly heard the defendant leave, she went to the store next door to get help.

Defendant's evidence tended to show that he lived almost a mile from the shoe store and was at home at the time of the attack on Mrs. Jolly. He also presented extensive evidence of his good character.

Attorney General Edmisten by Associate Attorney R. Darrell Hancock for the State.

Williamson, Walton and Williamson by C. Greg Williamson for defendant appellant.

CLARK, Judge.

[1] Defendant's first assignment of error is to the trial court's refusal to require the State to elect to try defendant on only one of the two indictments on the grounds that both indictments arose out of the same criminal act and consisted of the same elements such that trial on both charges violated constitutional proscriptions against double jeopardy. This argument is without merit. One of the elements of the offense of assault with a deadly weapon with intent to kill inflicting serious injury is the *intent to kill*. G.S. 14-32(a). This element is not required for conviction under G.S. 14-27.6 for an attempt to commit first-degree rape. Similarly, the intent to force another to "engage in vaginal intercourse," see G.S. 14-27.2, is a necessary element of attempt to commit first-degree rape under G.S. 14-27.6, but is not an element of assault with a deadly weapon with intent to kill inflicting serious bodily injury under G.S. 14-32(a). Since each offense included an element not common to the other offense, the defendant cannot complain that he was punished twice for the same conduct. See *State v. Evans*, 40 N.C. App. 730, 253 S.E. 2d 590 (1979). "A single act may be an offense against two statutes, and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution

State v. Glenn

and punishment under the other.” *State v. Stevens*, 114 N.C. 873, 877, 19 S.E. 861, 862 (1894), *quoted with approval in State v. Birkhead*, 256 N.C. 494, 124 S.E. 2d 838, 6 A.L.R. 3d 888 (1962); *State v. Revell*, 301 N.C. 153, 270 S.E. 2d 476 (1980).

We note also that the two convictions, while arising from the same series of events, do relate to separate actions by defendant. Defendant had already completed an attempt to commit first-degree rape when Mrs. Jolly temporarily escaped and ran to the front of the store. It was only after this, when defendant caught her, told her he would kill her, and stabbed her in the throat, twisting the knife and spreading the wound by forcing his fingers into the wound, that evidence arose to support a conviction of an assault with a deadly weapon *with intent to kill* inflicting serious injury. Prior to that point the evidence supports an intention on defendant’s part to rape Mrs. Jolly, not to kill her. Thus, the State did not use exactly the same evidence to establish both offenses. *See State v. Revell, supra*. We overrule defendant’s assignment of error based on double jeopardy.

[2] Defendant next argues the trial court erred in refusing to grant his motion to suppress a statement made by defendant while in police custody. The record contains the *voir dire* testimony of two of the officers who were in the police car at the time defendant made the statement. Both testified that they did not question defendant about the incident, but that defendant spontaneously stated, “I did not kill that woman. I just went in to find out where Larry [the store owner] was.” The only other evidence on *voir dire* was defendant’s testimony that he was questioned, threatened with an overnight lockup in jail if he refused to talk, and promised by the officers that if he would answer their questions, the officers would “get me off that case and let me go home free.” The evidence was undisputed that defendant had previously conferred with an attorney and that he had been advised to speak with no one about the incident. Based upon the foregoing, we conclude that the trial court’s finding that the statement was voluntarily given, and was not the result of government elicitation, is supported by ample, competent evidence and should be upheld. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971); *State v. Johnson*, 272 N.C. 239, 158 S.E. 2d 95 (1967). This assignment of error is overruled.

Utilities Comm. v. Power Co.

[3] Defendant's third argument is that he was entitled to an instruction on assault with a deadly weapon inflicting serious injury, because that is a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury. Compare G.S. 14-32(a) with G.S. 14-32(b). "The trial court need not submit a lesser included offense where there is no evidence to support such a verdict." *State v. Roper*, 39 N.C. App. 256, 258, 249 S.E. 2d 870, 871 (1978). The evidence of the State tended to show that the defendant stated his intention to kill Mrs. Jolly and then brutally stabbed her in the throat in such a manner as to establish a readily apparent intent to kill. See *State v. Jones*, 18 N.C. App. 531, 197 S.E. 2d 268, cert. denied, 283 N.C. 756, 198 S.E. 2d 726 (1973). The defendant's evidence tended to establish that he was not even in the shoe store on the day of the incident. On the evidence at trial, the jury had only two choices: either to believe defendant and find him innocent of all charges, or to believe the State and find him guilty of assault *with the intent to kill*. We hold that defendant was not entitled to an instruction on a lesser included offense.

We have examined the charge and find that the judge fairly charged the jury giving equal stress to the contentions of both sides and accurately instructed on the applicable law.

No error.

Judges ARNOLD and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.; THE CITY OF DURHAM; CAROLINA ACTION; KUDZU ALLIANCE; GREAT LAKES CARBON CORPORATION; AND RUFUS L. EDMISTEN, Attorney General v. DUKE POWER COMPANY

No. 8010UC1157

(Filed 5 May 1981)

Electricity § 3; Utilities Commission §§ 25, 41— rates for electricity — increase in depreciation reserve — fair rate of return

In this proceeding to determine a power company's rates for retail electric service, the Utilities Commission was correct in reducing the power company's rate base by increasing its depreciation reserve by \$3,879,000 due

Utilities Comm. v. Power Co.

to the fact that the power company had made similar adjustments to its depreciation and amortization expenses for the test year without making corresponding adjustments to its accumulated depreciation account, and the Commission's determination that 14.1% was a fair rate of return on common equity was fully supported by the record.

APPEAL by applicant in Docket No. E-7, Sub. 289 from an order of North Carolina Utilities Commission dated 7 October 1980. Heard in the Court of Appeals 3 April 1981.

On 29 February 1980, Duke Power Company [hereinafter "Duke"], the appellant herein, filed with the North Carolina Utilities Commission [hereinafter "the Commission"] an application to increase its rates for retail electric service in North Carolina by an average of approximately 9.6%, or \$91,600,000. The Commission, by an order dated 21 March 1980, suspended the proposed rate increase, declared the application to be a general rate case and set the matter for public hearings on the basis of a test year consisting of the twelve months ending 31 December 1979.

Public hearings were conducted and on 7 October 1980 the Commission issued its final order which, among other things, disallowed \$34,122,000 of the total increase applied for by Duke and allowed \$57,450,000 (63%) of such increase. Commissioner Tate dissented from the final order on the ground that there was no evidence to support the Commission's determination as to a fair rate of return on equity.

On 16 November 1980 Duke filed notice of appeal and exceptions.

Jerry B. Fruitt and Paul L. Lassiter for Public Staff, North Carolina Utilities Commission, appellee.

Byrd, Byrd, Ervin, Blanton & Whisnant by Robert B. Byrd for Great Lakes Carbon Corporation, intervenor appellee.

Thomas R. Eller, Jr. for North Carolina Textile Manufacturers Association, Inc., intervenor appellee.

W.I. Thornton, Jr. for City of Durham, intervenor appellee.

W. Travis Payne for Kudzu Alliance, intervenor appellee.

Steve C. Griffith, Jr., Edward L. Flippen, Clarence W. Walker, and Stephen K. Rhyne, for the appellant.

Utilities Comm. v. Power Co.

MARTIN (Robert M.), Judge.

On 30 December 1980, Duke filed a motion with this Court for an accelerated hearing on appeal. In that motion Duke cited three reasons in support of its request for an accelerated hearing and decision in this case as follows:

(a) The two issues in this appeal, i.e., rate base and rate of return, are integral components of any and every general rate case.

(b) G.S. §7A-30 provides for appeals of right to the North Carolina Supreme Court from decisions of this Court in general rate cases, and all general rate cases in the last ten years, to the best of counsels' knowledge, have been appealed to the Supreme Court.

(c) Unless the Supreme Court has time to hear and decide the issues in this appeal prior to the time the Commission issues a final order in Duke's next rate case, these important issues may be rendered moot under the doctrine set forth by the Supreme Court in *Utilities Commission v. Southern Bell Telephone & Telegraph Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1976).

This Court, by an order dated 13 January 1981 granted Duke's motion for an accelerated hearing. At oral argument, counsel for Duke again stated: "[w]e are convinced, as we said in our motion, that this case will be appealed to the Supreme Court regardless of what the decision [of this Court] is."

It is reasonably certain that the final disposition of this appeal will be determined by the Supreme Court. We, therefore, will not attempt to recapitulate the evidence or set out a detailed statement of the reasoning that leads us to the conclusion that the order of the Utilities Commission must be affirmed.

With regard to the first question presented in the appellant's brief, in our opinion, the Commission was correct in reducing Duke's rate base by increasing its depreciation reserve by \$3,879,000 due to the fact that Duke had made similar adjustments to its depreciation and amortization expenses for the test year without making corresponding adjustments to its accumulated depreciation account. The adjustments did not

Utilities Comm. v. Power Co.

contravene N.C. Gen. Stat. § 61-133(b)(1) and (c). Moreover, we believe that without such adjustments, Duke's rates would have been artificially high, thereby allowing it to earn more than a fair rate of return.

With regard to the second question presented in appellant's brief, in our opinion, the Commission's determination that 14.1% is a fair rate of return on common equity is fully supported by the record and was not arbitrary and capricious. In its order, the Commission made findings supported by competent evidence and adequately stated the reasons for its determination that 14.1% should be the rate of return on Duke's common equity.

Findings of fact by the Commission are conclusive and binding upon the reviewing court when supported by competent, material and substantial evidence in view of the entire record. *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890; *Utilities Commission v. Radio Service, Inc.*, 272 N.C. 591, 158 S.E. 2d 855.

"The determination is presumed to be valid and is not to be disturbed unless it is made to appear that it is clearly unreasonable and unjust." *In re Department of Archives & History*, 246 N.C. 392, 98 S.E. 2d 487.

Utilities Comm. v. Petroleum Transportation, Inc., 2 N.C. App. 566, 568, 163 S.E. 2d 526, 528 (1968).

For the reasons stated, the order of the Utilities Commission is affirmed.

Affirmed.

Judges WHICHARD and BECTON concur.

Pallet Co. v. Wood

PLYMOUTH PALLET COMPANY, INCORPORATED v. IRIS DAVIS
WOOD (A/K/A IRIS WOOD SUTTON)

No. 806SC898

(Filed 5 May 1981)

Gifts § 1—action to recover personal property—failure to instruct on defense of gift

Where plaintiff alleged that defendant converted certain items of personal property belonging to plaintiff and refused to pay rent that was owed to plaintiff and past due but defendant contended that these items were gifts made to her by plaintiff's chief executive officer and controlling stockholder, the trial court erred in failing to declare and explain the law of gift and erred in failing to submit the issue to the jury, since plaintiff's chief executive officer testified that he loved defendant, that she travelled with him and slept with him on a number of occasions, and that he wanted to marry her; the officer also testified that he controlled the plaintiff corporation, that he either paid for the items by personal check and was reimbursed by the company or defendant purchased them and was reimbursed by him; and the title and registration of a 1977 Oldsmobile which the officer provided for defendant were put in the name of defendant.

APPEAL by defendant from *Hobgood, Judge*. Judgment entered 16 April 1980 in Superior Court, HALIFAX County. Heard in the Court of Appeals 2 April 1981.

Plaintiff is a North Carolina corporation. Defendant was employed by plaintiff from September of 1975 to February of 1977. During part of this time and for a short while after her employment was terminated, she was involved in a personal relationship with plaintiff's chief executive officer, Mr. Ronald Harrison. Mr. Harrison admits he was in love with defendant, asked her to marry him, travelled with and slept with her and gave her and members of her family many gifts. In addition to these admitted gifts, defendant was provided with a 1977 Oldsmobile station wagon, which was purchased by Mr. Harrison, and for which he was reimbursed, and numerous items of household furniture and other personal property. Plaintiff also purchased a house which defendant occupied from January of 1977 until approximately April of 1978.

On 3 August 1978 plaintiff filed a complaint alleging that defendant had converted the property described in the complaint to her own use and had failed to pay rent she had agreed to pay for occupancy of the house purchased by plaintiff. Plaintiff sought to recover either the property or damages and \$2,000

Pallet Co. v. Wood

as unpaid rent. Defendant answered denying the allegations and asserting that all the items listed in the complaint were received by defendant, along with other items, as gifts from Mr. Harrison, and that she lived in the house bought by plaintiff at the request of Mr. Harrison and never agreed to pay rent.

Plaintiff's evidence at trial tended to show that the items of personal property and the house were furnished to defendant for her use only while employed by plaintiff; that other employees were furnished with similar items which were returned when their employment terminated; and that the items of personal property are carried as capital items on the corporate records of plaintiff. Defendant cross-examined each of plaintiff's witnesses but did not offer any evidence. Prior to the conclusion of the judge's charge to the jury the defendant submitted a requested charge on the law of gift, which the trial court denied. The jury returned a verdict for the plaintiff on the issues of the personal property and the automobile, and for the defendant on the issue of the past-due rent. From this verdict, the defendant appeals.

Allsbrook, Benton, Knott, Cranford and Whitaker, by Thomas I. Benton, for plaintiff appellee.

Tharrington, Smith and Hargrove, by Wade M. Smith and Douglas E. Kingsbery, for defendant appellant.

ARNOLD, Judge.

Defendant's only assignment of error is that the trial court erred in refusing to explain the law of gift to the jury and to submit that issue to them with appropriate instructions.

When charging the jury in a civil case, it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. G.S. 1A-1, Rule 51; *Cockrell v. Cromartie Transport Co.*, 295 N.C. 444, 245 S.E. 2d 497 (1978). When a party contends that certain acts constitute a defense against another, the trial court must submit the issue to the jury with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the defense asserted. See *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977).

Pallet Co. v. Wood

The substance of plaintiff's action is that defendant converted certain items of personal property belonging to plaintiff and refused to pay rent that was owed to plaintiff and past due. The only defense offered by defendant was that these items were gifts made to her by Mr. Harrison, plaintiff's chief executive officer and controlling stockholder. The essential elements of a gift *inter vivos* are: (1) the intent by the donor to give the donee the property in question so as to divest himself immediately of all right, title and control therein; and (2) the delivery, actual or constructive, of the property to the donee. 6 Strong's N.C. Index 3d, Gifts § 1 (1977).

It is apparent from a review of the record that the evidence, when viewed in the light most favorable to the defendant, will support a reasonable inference of the essential elements of the defense of gift. Mr. Harrison testified that he loved the defendant, that she had travelled with him and slept with him on a number of occasions, and that he wanted to marry her. He also testified that he controlled the plaintiff corporation, that either he paid for the items by personal check and was reimbursed by the company, or defendant purchased them and was reimbursed by him, and that the title and registration of the 1977 Oldsmobile were put in the name of the defendant. This evidence is sufficient to require the trial court to declare and explain the law of gift and submit the issue to the jury. Failure to do so was prejudicial error.

This action is remanded for a new trial.

New trial.

Judges HEDRICK and WEBB concur.

Carolina-Atlantic Distributors v. Teachey's Insulation

CAROLINA-ATLANTIC DISTRIBUTORS, INC., A CORPORATION, TRUSTEE FOR COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, CAROLINA-ATLANTIC DISTRIBUTORS, INC. v. TEACHEY'S INSULATION, INC., A CORPORATION; BENNIE TEACHEY, JR., AND JANICE F. TEACHEY

No. 8011DC853

(Filed 5 May 1981)

1. Taxation § 31- sales taxes – claim as trustee for Secretary of Revenue

Plaintiff's claim as trustee for the Secretary of Revenue to recover sales taxes from defendants was properly dismissed where plaintiff had previously paid the sales taxes and penalty, since the Secretary had no further claim for which plaintiff, or anyone else, could collect as trustee.

2. Taxation § 31- sales taxes – failure of retailer to collect – claim against purchaser

Plaintiff retailer could not collect from defendant purchaser for sales taxes on insulating materials sold by plaintiff to defendant where plaintiff failed to add sales taxes to the sales price of the insulating material at the "time of selling or delivering or taking an order" as required by G.S. 105-164.7.

APPEAL by defendants from *Pridgen, Judge*. Judgment entered 20 June 1980 in District Court, LEE County. Heard in the Court of Appeals 13 March 1981.

Stipulated facts upon which the trial court based its ruling reflect that from 6 August 1975 to 22 June 1977 plaintiff sold to the corporate defendant \$87,879.96 worth of insulating material. On 8 August 1978 the North Carolina Department of Revenue determined that a three percent sales tax was due on the sales and assessed plaintiff taxes plus interest in the total amount of \$2,886.81. Plaintiff paid the full amount of tax and interest to the Department of Revenue.

Alleging that it was acting as trustee for the Secretary of Revenue of the State of North Carolina plaintiff brought suit against the corporate defendant for the collection of the tax and, in a second cause of action, alleged that the individual defendants personally had guaranteed the corporate account.

Further stipulations indicate that the tax was not collected at the time of the sale, that defendants paid the sales tax on the one invoice on which plaintiff billed the tax, and that the individual defendants were liable for any amounts due plaintiff.

Carolina-Atlantic Distributors v. Teachey's Insulation

Plaintiff's cause of action as trustee for the Secretary was dismissed by the trial court, and judgment in the amount of the tax assessed was entered against defendants, the trial court concluding that both parties were on notice that the sales tax was due on the merchandise. Defendants appealed.

F. Jefferson Ward, Jr., for plaintiff appellees.

Bruce H. Robinson, Jr., for defendant appellant.

ARNOLD, Judge.

[1] First, answering the question raised by plaintiff's cross-assignment of error, there was no error in dismissal of plaintiff's cause of action as trustee for the Secretary of Revenue. Inasmuch as plaintiff previously had paid the tax and penalty assessed, the Secretary has no further claim for which plaintiff, or anyone else, might collect as trustee.

[2] The second, and more important, question is presented by defendants' assignment of error, contending the court erred in ruling that plaintiff could collect the sales tax from defendants. Their position rests solely upon the interpretation of G.S. 105-164.7 which provides:

Every retailer engaged in the business of selling or delivering or taking orders for the sale or delivery of tangible personal property for storage, use or consumption in this State shall at the time of selling or delivering or taking an order for the sale or delivery of said tangible personal property or collecting the sales price thereof or any part thereof, add to the sales price of such tangible personal property the amount of the tax on the sale thereof and when so added said tax shall constitute a part of such purchase price, shall be a debt from the purchaser to the retailer until paid and shall be recoverable at law in the same manner as other debts. Said tax shall be stated and charged separately from the sales price and shown separately on the retailer's sales records and shall be paid by the purchaser to the retailer as trustee for and on account of the State and the retailer shall be liable for the collection thereof and for its payment to the Secretary and the Retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability. It is the purpose and intent of this Article that the tax herein levied and imposed shall

Byrd v. Byrd

be added to the sales price of tangible personal property when sold at retail and thereby be born and passed on to the customer, instead of being born by the retailer.

This statute requires the retailer to add the amount of tax at the "time of selling or delivering or taking an order" to the sales price and "*when so added*" the amount of the tax constitutes part of the purchase price and becomes "*a debt from the purchaser to the retailer until paid.*" (Emphasis added.) The statute requires, moreover, that the sales tax shall be "stated and charged separately" and "shown separately."

The intent of the law, plaintiff correctly argues, is that the sales tax be passed on to the consumer. *Rent-A-Car Co., Inc. v. Lynch*, 39 N.C. App. 709, 251 S.E. 2d 917, *rev'd on other grounds*, 298 N.C. 559, 259 S.E. 2d 564 (1979). Plaintiff contends, therefore, that the equities should be balanced here to allow recovery of the assessment from defendants. We disagree.

If plaintiff had complied with the statute, and added the amount of sales tax in the manner required, the amount of tax would be a debt on behalf of defendants. However, because plaintiff did not comply with the statute, it cannot now require defendants to pay the tax. Liability to collect the tax is imposed by G.S. 105-164.7 on plaintiff as the retailer. See *Rent-A-Car, supra*. The uncontested facts show that plaintiff retailer did not comply with the requirements of the statute and it must therefore suffer the liability of the taxes imposed.

Reversed.

Judges CLARK and MARTIN (Harry C.) concur.

EDITH HUMPHREY BYRD v. DONALD GARY BYRD

No. 808DC966

(Filed 5 May 1981)

Appeal and Error § 14—notice of appeal not timely

Where judgment was entered 8 August 1980 in open court, defendant and his counsel were present in court at that time, the written judgment was filed 19 August 1980, and defendant gave notice of appeal on 19 August 1980,

Byrd v. Byrd

the trial court properly found that more than ten days elapsed between the entry of judgment and the notice of appeal and therefore properly dismissed defendant's appeal.

APPEAL by defendant from *Ellis (Kenneth R.)*, Judge. Order entered 27 August 1980 in District Court, LENOIR County. Heard in the Court of Appeals 9 April 1981.

Plaintiff filed a complaint on 15 July 1980 seeking custody of the minor child born of her marriage to defendant, alimony and child support pendente lite, attorney's fees, a writ of possession of the family residence and other relief. The defendant filed an answer generally denying the allegations of the complaint and seeking joint custody. After the presentation of evidence and argument of counsel, the judge announced his decision in open court on 8 August 1980. The written judgment, filed 19 August 1980, was marked "entered 8 August 1980" and was dated 18 August 1980. Defendant gave notice of appeal 19 August.

Plaintiff moved to dismiss the appeal as not timely entered. The trial court found that the judgment was entered 8 August 1980 in open court, and that the defendant and his counsel were present in court at that time. The court further found that more than 10 days elapsed between the entry of judgment and the notice of appeal and therefore dismissed defendant's appeal. Defendant appeals from this dismissal.

Douglas P. Connor for plaintiff appellee.

Fred W. Harrison for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred when it dismissed his notice of appeal. Specifically, he argues that the words of the district judge on pages 15-22 of the record were not such as to constitute the entry of a judgment.

G.S. 1A-1, Rule 58 defines the entry of judgment as follows: "... where judgment is rendered in open court, the clerk shall make a notation in his minutes ... and such notation shall constitute the entry of judgment. ..." The record before us indicates that the judgment in this case was "entered" in open court on 8 August 1980, and that the defendant and his counsel were present in court at the time the judgment of the court was

Byrd v. Byrd

stated. An appeal in a civil action, when taken by written notice, must be taken within ten days after entry of judgment. G.S. 1-279(c); Rule 3(c), N.C. Rules of Appellate Procedure. Here the judgment was entered 8 August and notice of appeal was given on 19 August. Since the ten-day period was exceeded, the appeal was properly dismissed.

The order of the trial court is

Affirmed.

Judges HEDRICK and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 21 APRIL 1981

BRYANT v. LOWERY No. 804SC839	Duplin (79CVS205)	No Error
CARTER v. GRAY No. 8028SC735	Buncombe (79CVS1134)	No Error
HIGBEE v. HIGBEE No. 8019DC834	Rowan (80CVD563)	Affirmed
IN RE OWEN No. 8029DC826	Transylvania (76J34)	Dismissed
JOHNSON v. JOHNSON No. 8015DC830	Alamance (77CVD1157)	Affirmed in Part; Vacated in Part, and Remanded
KNIGHT v. KNIGHT No. 8018DC969	Guilford (80CVD3215)	Reversed and Remanded
STATE v. BYRD & JOHNSON No. 8023SC1124	Wilkes (80CRS2089) (80CRS2090) (80CRS2091) (80CRS2092) (80CRS2187) (80CRS2188) (80CRS2189)	Affirmed
STATE v. CAMPBELL No. 8016SC1082	Scotland (79CRS3466)	No Error
STATE v. DICKERSON No. 8014SC1141	Durham (70CRS7250)	Affirmed
STATE v. DUNCAN No. 8015SC1114	Orange (80CR1231) (80CR1232) (80CR1236) (80CR1237)	No Error
STATE v. HARPER No. 8026SC1102	Mecklenburg (80CRS21194)	No Error
STATE v. HICKS No. 8022SC1153	Iredell (79CRS12522)	Dismissed
STATE v. KIRBY No. 8013SC1031	Brunswick (79CRS3593)	No Error

STATE v. MILLER No. 804SC1028	Onslow (80CRS10347)	No Error
STATE v. NORTON No. 8020SC1133	Richmond (80CRS4093)	No Error
STATE v. PARKER No. 8014SC765	Durham (79CRS17654)	No Error
STATE v. SOUTHERN No. 8013SC1066	Columbus (80CRS2135) (80CRS2165) (80CRS2133) (80CRS2130) (80CRS2131)	No Error
STEWART v. REMCA No. 8010DC892	Wake (78CVD6576)	Appeal Dismissed

CASES REPORTED WITHOUT PUBLISHED OPINION
(Continued)

FILED 5 MAY 1981

CAROLINA BUILDERS CORP. v. MARVIN WRIGHT & CO., INC. No. 8018SC925	Guilford (79CVS1533)	Reversed and Remanded
CORRIHER v. CORRIHER No. 809SC949	Person (79CVS438)	Dismissed
REYNOLDS v. REYNOLDS No. 8015DC918	Chatham (77CVD277)	Affirmed
STATE v. HAMMOCK No. 8012SC1162	Hoke (79CRS4780)	No Error
STATE v. HOOPER No. 8021SC1080	Forsyth (78CRS39057) (78CRS39999)	Affirmed
STATE v. HURST No. 8015SC1166	Alamance (80CRS3973) (80CRS3974)	No Error
STATE v. PETERSON No. 803SC1136	Pitt (80CRS5505) (80CRS5507) (80CRS5529)	No Error
STATE v. ROGERS No. 808SC1196	Wayne (80CR10240)	No Error

ANALYTICAL INDEX



WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW
AGRICULTURE
APPEAL AND ERROR
ARBITRATION AND AWARD
ASSAULT AND BATTERY
ATTORNEYS AT LAW
AUTOMOBILES

BANKS AND BANKING
BASTARDS
BILLS AND NOTES
BILLS OF DISCOVERY
BROKERS AND FACTORS
BURGLARY AND UNLAWFUL
BREAKINGS

CONSPIRACY
CONSTITUTIONAL
CONTRACTS
CORPORATIONS
COSTS
COURTS
CRIMINAL LAW

DAMAGES
DEEDS
DIVORCE AND ALIMONY

EASEMENTS
ELECTRICITY
EVIDENCE

FORGERY
FRAUD
FRAUDS, STATUTE OF

GIFTS

HOMICIDE

INDICTMENT AND WARRANT
INFANTS
INSURANCE

JUDGMENTS

JURY

KIDNAPPING

LARCENY
LIBEL AND SLANDER
LIMITATION OF ACTIONS

MALICIOUS PROSECUTION
MASTER AND SERVANT
MECHANICS' LIENS
MUNICIPAL CORPORATIONS

NARCOTICS
NEGLIGENCE

PARTITION
PRINCIPAL AND AGENT
PROCESS
PROFESSIONS AND OCCUPATIONS
PUBLIC OFFICE

RAPE
RECEIVING STOLEN GOODS
ROBBERY
RULES OF CIVIL PROCEDURE

SALES
SCHOOLS
SEARCHES AND SEIZURES
SOCIAL SECURITY AND PUBLIC
WELFARE

TAXATION
TORTS
TRIAL

UNFAIR COMPETITION
UNIFORM COMMERCIAL CODE
UTILITIES COMMISSION

WATERS AND WATERCOURSES
WILLS
WITNESSES

ADMINISTRATIVE LAW

§ 4. Orders of Administrative Boards and Agencies

The Environmental Management Commission did not act arbitrarily or capriciously in deciding not to declare the Yadkin River Basin a capacity use area. *High Rock Lake Assoc. v. Environmental Management Comm.*, 275.

AGRICULTURE

§ 5. Rights of Lienholders Against Warehouseman Selling Crop

In an action to recover one-half the total sum due for tobacco sold by plaintiff's tenant at defendants' warehouse, plaintiff was entitled to the sum claimed under the landlord's lien statute, and plaintiff, as a matter of law, did not waive his lien nor was he estopped to assert it. *Sugg v. Parrish*, 630.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

In an action by husband and wife to recover for damages sustained in an automobile accident with defendant, trial court's order dismissing the wife's claim, though it adjudicated the rights and liabilities of fewer than all the parties, was immediately appealable since it affected a substantial right of the wife. *Cunningham v. Brown*, 264.

In a proceeding for a partition sale of real property owned by the parties as tenants in common where petitioner prayed that respondent be held indebted to her and that she have a lien on the proceeds of the sale on account of a deed of trust which had been placed on the property for the benefit of respondent, trial court's order dismissing petitioner's claim for relief was not appealable. *Boyce v. Boyce*, 422.

The entry of default by the clerk is not immediately appealable. *Looper v. Looper*, 569.

In an action arising out of a contract for the construction of a house, trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass but allowing defendants to assert these counterclaims as set-offs to plaintiffs' claim, though not a final judgment, was appealable since it affected a substantial right of defendants. *Roberts v. Heffner*, 646.

§ 14. Appeal and Appeal Entries

Defendant's letter to the clerk of court was not a written notice of appeal of a divorce judgment but was a Rule 59 motion for a new trial. *Williford v. Williford*, 150.

Defendant's appeal was properly dismissed where notice of appeal was not timely. *Byrd v. Byrd*, 707.

§ 16.1. Limitations on Powers of Trial Court After Appeal

The trial judge was without authority to enter an order requiring plaintiff to pay an attorney's fee in an alimony action since the matter was on appeal at the time of entry of her order. *Condie v. Condie*, 522.

APPEAL AND ERROR – Continued**§ 68.2. Law of the Case; Decision as to Sufficiency of Evidence**

The dismissal at the first trial of plaintiff's claim for personal injuries and damages to their car based on negligence became the law of the case and binding upon the court at the second trial. *Duffer v. Dodge, Inc.*, 129.

ARBITRATION AND AWARD**§ 9. Attack on Award**

Defendant was not entitled to have an arbitration award set aside because the arbitrator appointed by plaintiff had prior knowledge of the facts and a business connection with plaintiff. *Thomas v. Howard*, 350.

ASSAULT AND BATTERY**§ 2. Defenses in Civil Actions for Assault**

Plaintiff's evidence did not establish the defense of justification as a matter of law in an action to recover damages allegedly resulting from an assault and battery committed upon plaintiff by defendant. *Shugar v. Guill*, 466.

Testimony in an action to recover damages for assault and battery was relevant to show provocation in mitigation of plaintiff's compensatory damages, and the trial court erred in limiting the jury's consideration of such testimony to the question of mitigation of punitive damages. *Ibid.*

§ 13. Competency of Evidence

In a prosecution of defendant for assault with a deadly weapon inflicting serious injuries, the trial court did not err in allowing the victim to testify that defendant was having an affair with the victim's wife. *S. v. Lednum*, 387.

§ 15.2. Instructions on Assault With Deadly Weapon Inflicting Serious Injuries

In a prosecution of defendant for assault with a deadly weapon inflicting serious injuries, trial court did not err in instructing the jury that a knife was a deadly weapon. *S. v. Lednum*, 387.

§ 15.6. Instructions on Self-Defense

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, trial court's error in failing to charge regarding the evidence that the victim was a violent and dangerous man was not prejudicial. *S. v. Powell*, 224.

§ 16.1. Submission of Lesser Offenses Not Required

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was not entitled to an instruction on assault with a deadly weapon inflicting serious injury. *S. v. Glenn*, 694.

ATTORNEYS AT LAW**§ 2. Admission to Practice**

Plaintiff was not prejudiced by the trial court's error in permitting a Michigan attorney to appear for a friend of the court from Michigan in a child custody hearing without complying with requirements of G.S. 84-4.1. *Pope v. Jacobs*, 374.

ATTORNEYS AT LAW – Continued**§ 7.2. Fees in Cases Involving Indigent Criminal Defendants**

Plaintiff attorney's allegations that defendant members of a county Bar Association committee had deleted plaintiff's name from indigent defendant appointment lists and that the District Bar had not adopted a plan authorizing defendants to formulate rules for appointment of counsel failed to state a claim for damages based on a denial of due process or trespass against plaintiff's property rights under G.S. 99A-1. *Noell v. Winston*, 455.

Trial court erred in entering judgment against an indigent defendant for attorney fees and costs without giving defendant notice and an opportunity to be heard. *S. v. Washington*, 458.

§ 7.5. Allowance of Fees as Part of Costs

The amount of an attorney's fee awarded in a tax foreclosure proceeding under G.S. 105-374 is to be determined pursuant to G.S. 105-374(i) in the discretion of the trial court and is not limited by the provisions of G.S. 6-21.2. *Town of Sylva v. Gibson*, 545.

Where the district court entered a judgment against defendant for delinquent taxes plus costs, including a fee of \$350 for plaintiff town's attorney, another district court judge did not have authority under Rule 60(b) to modify the prior judgment as to the amount of the attorney's fee. *Ibid.*

AUTOMOBILES**§ 5. Sale and Transfer of Title to Vehicles**

In an action for declaratory judgment to determine the right to ownership, title, possession or a security interest in a recreational vehicle as between plaintiff-manufacturer and defendant-consumer financier, trial court properly entered summary judgment for plaintiff where the stipulated facts and partial settlement agreement entered into by the parties tended to show that the manufacturer's statements of origin were at all times in the possession of plaintiff. *American Clipper Corp. v. Howerton*, 539.

§ 6.5. Fraud in Sale of Vehicles

Plaintiffs' evidence was sufficient for the jury in an action to recover damages pursuant to the Vehicle Mileage Act. *Duffer v. Dodge, Inc.*, 129.

§ 45.6. Evidence of Blood or Breathalyzer Tests

In an action to recover for property damage and wrongful death arising from a collision involving two cars driven by defendants and a tractor trailer driven by plaintiff's intestate, trial court erred in excluding testimony concerning breathalyzer tests administered to defendants three or four hours after the fatal collision. *Trucking Co. v. Phillips*, 85.

§ 47. Physical Facts at Scene

In an action to recover for property damages and wrongful death arising from an automobile accident, trial court erred in excluding evidence concerning the condition of the highway after the accident. *Trucking Co. v. Phillips*, 85.

AUTOMOBILES – Continued

§ 50. Sufficiency of Evidence of Negligence Generally

In an action to recover for property damage and wrongful death arising from a collision involving cars changing lanes on an interstate, evidence was sufficient to raise issues of fact as to whether plaintiff's intestate's injuries were proximately caused by defendants' negligence and whether plaintiff's intestate was contributorily negligent. *Trucking Co. v. Phillips*, 85.

§ 78. Contributory Negligence in Passing Vehicle Traveling in Opposite Direction

Trial court properly directed verdict for defendants where the evidence tended to show that plaintiff was contributorily negligent as a matter of law in driving his motorcycle in the left hand part of his lane. *Burrow v. Jones*, 549.

§ 79. Contributory Negligence in Intersection Accidents

In an action to recover for injuries sustained by plaintiff in an intersection accident, the issue of plaintiff's contributory negligence was properly submitted to the jury. *Seaman v. McQueen*, 500.

§ 80.3. Contributory Negligence in Turning into Driveway

In an action to recover damages sustained in an automobile accident which occurred when defendant attempted to pass plaintiff's vehicle as she turned left into a driveway, evidence did not require the granting of a directed verdict for defendant on the ground of plaintiff's contributory negligence. *Spruill v. Summerlin*, 452.

§ 89.1. Sufficient Evidence of Last Clear Chance

In an action to recover for the death of plaintiff's intestate who was struck by defendant's pickup truck, evidence was sufficient to be submitted to the jury on the issue of last clear chance. *Williams v. Spell*, 134.

§ 113.1. Sufficient Evidence of Death by Vehicle

State's evidence was sufficient for the jury in a prosecution for death by vehicle while failing to reduce speed to avoid an accident. *S. v. Clements*, 113.

§ 120. Elements of Driving Under Influence of Intoxicants

The offense of reckless driving under G.S. 20-140(c) is not a lesser included offense of operating a vehicle upon a highway when the amount of alcohol in the driver's blood is .10% or more, a violation of G.S. 20-138(b). *S. v. Donald*, 238.

§ 126.4. Blood and Breathalyzer Tests in DUI Case

Trial court erred in concluding that petitioner did not willfully refuse to submit to a breathalyzer test. *Sermons v. Peters, Comr. of Motor Vehicles*, 147.

Where defendant made it clear that he would not voluntarily submit to a breathalyzer test, it was not necessary for the State to present evidence that defendant was advised of his right to refuse the breathalyzer test before evidence of that refusal could be used against him at a trial for driving under the influence. *S. v. Simmons*, 440.

§ 127.1. Sufficient Evidence of DUI

Evidence was sufficient for the jury in a prosecution of defendant for driving under the influence, second offense. *S. v. Fenner*, 156.

BANKS AND BANKING**§ 3. Duties to Depositors**

Trial court erred in finding and concluding that savings accounts were validly assigned by the depositors to plaintiffs where the rules governing the accounts required that defendant bank consent to any assignment, and defendant had refused to accept the assignments in this case. *Rosenstein v. Mechanics and Farmers Bank*, 437.

BASTARDS**§ 8.1. Verdict on Issue of Paternity**

A judgment of acquittal in a criminal prosecution for willful failure to support two illegitimate children was not res judicata in a county's civil action to establish defendant's paternity of the two children. *Stephens v. Worley*, 553.

BILLS AND NOTES**§ 19. Defenses in Actions on Notes**

In an action to recover on two promissory notes executed by defendant and made payable to plaintiff, trial court erred in entering summary judgment for plaintiff where evidence of defendant's defenses was sufficient to be submitted to the jury. *First Citizens Bank v. Holland*, 529.

BILLS OF DISCOVERY**§ 6. Compelling Discovery in Criminal Case**

There was no merit to defendant's contention that the trial judge's denial of the opportunity to conduct discovery after counsel was appointed violated G.S. 15A-902. *S. v. Berry*, 97.

BROKERS AND FACTORS**§ 6. Right to Commissions**

Evidence was sufficient to be submitted to the jury in an action by plaintiff real estate broker to recover a commission on property listed with plaintiff by defendant. *Jaudon v. Swink*, 433.

BURGLARY AND UNLAWFUL BREAKINGS**§ 2. Breaking and Entering**

An unoccupied mobile home not affixed to the premises and intended for retail sale is a "building" within the meaning of the statute prohibiting the breaking or entering of buildings. *S. v. Douglas*, 594.

§ 5. Sufficiency of Evidence Generally

State's evidence was sufficient for the jury in a prosecution for first degree burglary. *S. v. Jacobs*, 324.

§ 5.5. Sufficiency of Evidence of Breaking and Entering

In a prosecution for felonious breaking and entering, evidence with respect to defendant's intent to commit larceny was sufficient to be submitted to the jury. *S. v. Costigan*, 442.

CONSPIRACY

§ 2. Actions for Civil Conspiracy

Plaintiffs' complaint stated a claim for relief against defendant bank and defendant mortgage lender for civil conspiracy to deny plaintiffs a loan and for treble damages under the unfair trade practices statute. *Pedwell v. First Union Natl. Bank*, 236.

Plaintiff could not use the same alleged acts to form both the basis of a claim for conspiracy to commit certain torts and the basis of claims for those torts. *Jones v. City of Greensboro*, 571.

CONSTITUTIONAL LAW

§ 34. Double Jeopardy

Defendant's constitutional protection against double jeopardy was not violated by his fourth trial for larceny after a prior mistrial for juror misconduct and two prior mistrials for failure of the jury to agree on a verdict. *S. v. Williams*, 613.

§ 40. Right to Counsel

There was no merit to the State's argument that, since defendant was not imprisoned but rather was given a suspended sentence, she was not entitled to counsel at her trial and, since she was provided with the opportunity to have a lawyer at the time she faced imprisonment at the probation revocation hearing, no error was committed. *S. v. Black*, 687.

§ 49. Waiver of Counsel

The trial court was not required to appoint counsel to represent defendant where defendant had previously signed two waivers of his right to counsel, had told the trial judge on several occasions that he was financially able to hire his own counsel, and suddenly changed his mind five minutes before the trial began and asked the court to appoint him a lawyer. *S. v. Atkinson*, 683.

§ 50. Speedy Trial

Defendant was not denied his constitutional right to a speedy trial since his trial commenced 30 days from the date of his indictment, and even if the time was calculated from the original indictment against him, only 226 days elapsed from the date of indictment to date trial commenced and defendant failed to show prejudice from the delay. *S. v. Moore*, 26.

Defendant was not denied his constitutional right to a speedy trial on an escape charge by a four year delay between his escape and his trial or by a lapse of less than three months between his arrest and his trial. *S. v. Watson*, 369.

§ 67. Identity of Informants

Defendant's right to due process was violated by the State's refusal to reveal the identity of a confidential informant who introduced an SBI undercover agent to defendant and was present when defendant sold marijuana to the agent. *S. v. Hodges*, 229.

CONTRACTS

§ 6.1. Contracts of Unlicensed Contractors

Defendants were barred from asserting their claims under a contract to

CONTRACTS – Continued

construct a dwelling for plaintiffs, since defendants were unlicensed general contractors and the price of the construction was in excess of \$30,000. *Roberts v. Heffner*, 646.

A builder who is unable or unwilling to obtain a general contractor's license from the State of N.C. should not be allowed to thwart the plain intent of G.S. 87-1 by the artifice of contracting to build a residence for another on the builder's land. *Ibid.*

§ 14.2. Contracts Not For Benefit of Third Persons

A contract between a lending institution and defendant appraiser for the appraisal of a house which plaintiffs intended to buy was not entered into for plaintiffs' benefit, and plaintiffs therefore were not entitled to recover on the contract as its intended beneficiaries. *Alva v. Cloninger*, 602.

§ 16.1. Time of Performance

An oral loan made before the parites agreed as to the time and manner of repayment was payable within a reasonable time rather than on demand. *Helms v. Prikopa*, 50.

§ 24. Parties

The feme defendant was liable for damages for breach of a contract since she was a party to such contract. *Coley v. Eudy*, 310.

§ 27.2. Sufficiency of Evidence of Breach of Contract

Summary judgment was properly entered for defendant in an action to recover damages from leaks in the roof of plaintiff's building due to unusual weather while defendant's guards provided security service for the building. *Blue Jeans Corp. v. Pinkerton, Inc.*, 137.

§ 28. Instructions in Contract Actions

In a breach of contract action evidence was sufficient to raise a question for the jury as to whether the parties intended to enter into a thirty month contract or whether they intended to enter a contract for a renewal term, and trial court erred in failing to so instruct the jury. *Uniform Service v. Bynum International, Inc.*, 203.

§ 29.2. Instructions on Calculation of Damages

The trial court gave erroneous instructions on damages in an action for breach of a contract in which defendants agreed to accept plaintiffs' Rowan County home as a trade-in on a newly constructed home in Concord and to assume two mortgages on plaintiffs' Rowan County home. *Coley v. Eudy*, 310.

CORPORATIONS**§ 25. Corporate Contracts**

Invoices billing a corporation for truck repair work established knowledge on the part of the agent of plaintiff who filled out the invoices that defendant's trucking business was being carried on as a corporation, and the knowledge of plaintiff's agent was imputed to plaintiff. *Bone International, Inc. v. Brooks*, 183.

COSTS

§ 3.1. Allowance of Attorney Fees in Discretion of Court

Where plaintiff accepted defendants' offer of judgment in a specified amount plus "costs accrued at the time this offer is filed," the trial court had authority to award plaintiff attorney fees accrued at the time the offer of judgment was made as part of the costs then accrued. *Yates Motor Co. v. Simmons*, 339.

COURTS

§ 2.4. Objections to Jurisdiction

There was no merit to defendant's contention that he did not receive notice and a hearing on his motion to dismiss an action against him for lack of personal jurisdiction. *Fungaroli v. Fungaroli*, 363.

§ 9.6. Jurisdiction to Review Rulings of Another Judge; Final Judgments

In ruling on a motion to set aside a default judgment, the trial court had no authority to determine whether defendant had made an appearance in the case where the court which entered the default judgment had previously ruled that defendant had made no appearance. *Whitfield v. Wakefield*, 124.

CRIMINAL LAW

§ 7.1. Entrapment

The evidence in a prosecution for possession and sale of cocaine did not show entrapment as a matter of law but presented a question of entrapment for the jury. *S. v. Grier*, 209.

§ 22. Arraignment and Pleas

Where defendant waived arraignment, he could not sustain his burden of showing prejudice from insufficient notice resulting from the technicality of an incomplete officer's return on the bill of indictment. *S. v. Daniels*, 294.

§ 26.3. Plea of Former Jeopardy for Same Offense

Defendant was not subjected to double jeopardy where the State initially proceeded against him by way of a magistrate's order, the misdemeanor prosecution was dismissed on the day of the probable cause hearing, and the State subsequently obtained a warrant for defendant's arrest on the charges identical to those alleged in the original magistrate's order and an indictment was obtained against defendant for the felony. *S. v. Lee*, 344.

§ 26.5. Plea of Former Jeopardy for Same Acts Violating Different Statutes

Where defendant entered a plea of guilty to a charge of failing to yield the right-of-way, the trial of defendant on a charge of death by vehicle in that he unlawfully failed to yield the right-of-way would place defendant in jeopardy for a second time on the charge of failure to yield. *S. v. Griffin*, 564.

Defendant was not subjected to double jeopardy where he was charged and convicted of assault with deadly weapon with intent to kill inflicting serious injury and attempt to commit first degree rape, though both crimes arose from the same series of events. *S. v. Glenn*, 694.

CRIMINAL LAW – Continued**§ 26.8. Plea of Former Jeopardy After Mistrial**

Defendant's constitutional protection against double jeopardy was not violated by his fourth trial for larceny after a prior mistrial for juror misconduct and two prior mistrials for failure of the jury to agree on a verdict. *S. v. Williams*, 613.

§ 29. Mental Capacity to Stand Trial

The trial court did not err in finding that defendant was mentally capable of standing trial on the basis of a psychiatric report which noted that defendant "has had a fluctuating mental status and at intervals he may not be viewed as being competent." *S. v. Jacobs*, 324.

§ 29.1. Procedure for Determining Issue of Capacity

Where a hearing had been held after the first commitment of defendant to determine his mental competency to stand trial, the trial judge's review of a second psychiatric report was a sufficient compliance with statutory hearing requirements. *S. v. Jacobs*, 324.

§ 32.1. Burden of Proof; Effect of Particular Presumptions

Presumption that defendant either forged or consented to the forging of a check when it is shown that defendant had a forged check in his possession and attempted to obtain money or advances upon it does not violate due process. *S. v. Roberts*, 221.

§ 34. Evidence of Defendant's Guilt of Other Offenses; Inadmissibility

Trial court erred in admitting over defendant's objection evidence relating to his commission of other distinct, independent, or separate offenses. *S. v. Moore*, 26.

§ 34.4. Admissibility of Evidence of Other Offenses Generally

Evidence elicited from defendant concerning his arrest for certain traffic violations shortly after a burglary was competent to establish the time frame in which the burglary took place and to show flight. *S. v. Jacobs*, 324.

§ 34.8. Evidence of Other Offenses to Show Common Scheme or Design

Evidence in a rape prosecution that defendant committed assaults on two other women on the same date as the rape was competent to show defendant's state of mind and his common scheme and design to apply physical force in the commission of crimes of violence. *S. v. Rick*, 383.

§ 38. Evidence of Like Facts and Conditions

In a prosecution of defendant for the murder of his wife where defendant contended that he accidentally shot her, trial court erred in permitting evidence that defendant had pointed the gun at other persons on earlier occasions. *S. v. McAdams*, 140.

§ 46.1. Competency of Evidence to Show Flight

Evidence elicited from defendant concerning his arrest for certain traffic violations shortly after a burglary was competent to establish the time frame in which the burglary took place and to show flight. *S. v. Jacobs*, 324.

CRIMINAL LAW – Continued**§ 58. Evidence in Regard to Handwriting**

Trial court did not err in admitting handwriting samples obtained from defendant by an S.B.I. agent pursuant to an order issued by a district court judge in another county in another case. *S. v. Daniels*, 294.

§ 60.2. Fingerprint Cards

Trial court did not err in admitting fingerprint cards obtained from defendant by an S.B.I. agent pursuant to an order issued by a district court judge in another county in another case. *S. v. Daniels*, 294.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification

A witness's in-court identification of defendants was not tainted by an impermissibly suggestive out-of-court identification procedure. *S. v. Snowden and S. v. Boggs*, 511.

§ 69. Telephone Conversations

The evidence was sufficient to permit an inference that a witness recognized defendant's voice when he called her on the telephone so as to permit the witness to testify as to the telephone conversations with defendant. *S. v. Jorgenson*, 425.

§ 72. Evidence as to Age

An officer's testimony showed that he had sufficiently observed defendant to render admissible his opinion testimony that he had determined defendant's age to be 28 at the time of defendant's arrest. *S. v. Campbell*, 418.

§ 73.2. Statements Not Within Hearsay Rule

A robbery victim's testimony that defendant's accomplice told him that if he did not give the accomplice his money defendant was going to hurt him was not inadmissible hearsay. *S. v. Cleveland*, 159.

Testimony by an undercover agent that a third person asked defendant if she knew where he could get "some coke" was not hearsay and was properly admitted. *S. v. Grier*, 209.

A witness's testimony about a conversation he had with a person at a church concerning stolen stereo speakers was not inadmissible hearsay. *S. v. Harper*, 493.

§ 75.9. Volunteered and Spontaneous In-Custody Statements

Trial court did not err in refusing to grant defendant's motion to suppress a spontaneous statement made by him while in police custody. *S. v. Glenn*, 694.

§ 77.2. Self-Serving Declarations

A witness's testimony that he was attempting to obtain stolen stereo speakers in order to return them to their owner and that he did not intend to keep them was not excludable as a self-serving declaration. *S. v. Harper*, 493.

§ 88. Cross-Examination Generally

Trial court did not abuse its discretion in refusing to permit defendant to explain one of her answers on cross-examination concerning the presence of a reputed cocaine dealer in the courtroom. *S. v. Grier*, 209.

CRIMINAL LAW – Continued**§ 89.7. Impeachment of Witness; Mental Capacity**

Trial court in a prosecution for rape of a mentally retarded female did not have the authority to grant defendant's motion to require a psychiatric examination of the alleged victim. *S. v. Clontz*, 639.

§ 91. Statutory Right to Speedy Trial

Defendant was not entitled to have his speedy trial motion granted where he was indicted on 27 August 1979, a new indictment for the same offenses was issued 7 January 1980, defendant filed a motion for speedy trial dismissal on 8 February 1980, and defendant's trial commenced 10 April 1980. *S. v. Moore*, 26.

Defendant's statutory right to a speedy trial was not violated though he was tried more than 120 days after indictment, since he was tried in a county with a limited number of court sessions and the time limitations of G.S. 15A-701 could not reasonably be met. *S. v. Berry*, 97.

Defendant was not denied his right to a speedy trial where he was indicted on 4 September 1979, voluntarily made himself unavailable for trial at the 17 December 1979 session of court, and was tried at the next session of criminal court beginning on 7 January 1980. *S. v. Cornell*, 108.

Defendant was not denied his right to a speedy trial, though five months elapsed between service of criminal process and trial, since, excluding the time of a continuance entered to "protect the interests of the defendant so that he would not be prejudiced by testimony heard during the companion case [of defendant's accomplice]," defendant was tried within 120 days. *S. v. Daniels*, 294.

Defendant was denied his right to a speedy trial where 243 days elapsed between arrest and trial and the State failed to show that, due to a limited number of terms of court, the time limitation of the Speedy Trial Act could not reasonably be met. *S. v. Vaughan*, 408.

§ 91.6. Motion for Continuance to Obtain Additional Evidence

In a fourth trial of a defendant for misdemeanor larceny after three previous trials had ended in mistrials, the trial court did not abuse its discretion in the denial of defendant's motion for a continuance so that he could obtain a transcript of the third trial to aid in impeaching the credibility of the State's witnesses. *S. v. Williams*, 613.

§ 91.8. Time and Procedure for Motion for Continuance

Defendant's motion for a continuance was not timely made. *S. v. Berry*, 97.

§ 98. Presence and Conduct of Defendant

There was no merit to defendant's contention that the trial court erred by permitting him, over objection, to be tried in the uniform of a prisoner. *S. v. Berry*, 97.

§ 99.2. Expression of Opinion by Court by Remarks and Conduct During Trial

There was no merit to defendant's contention that the trial judge erred by asking defense counsel in the presence of the jury whether there were any affirmative defenses of which counsel wished the judge to inform the jury. *S. v. Berry*, 97.

CRIMINAL LAW – Continued

The trial court did not impermissibly comment on the evidence or express an opinion in instructing defense counsel not to lead witnesses. *S. v. Lednum*, 387.

The trial judge did not express an opinion and ridicule defendant before the jury when he correctly explained to defendant and the jury the reason for his denial of assigned counsel. *S. v. Atkinson*, 683.

§ 101. Conduct or Misconduct Affecting Jury

Trial court properly denied defendant's motion for a mistrial because of the court's failure to instruct the jury prior to a lunch recess not to discuss the case. *S. v. Grier*, 209.

§ 112.6. Instructions on Defenses

In a prosecution of a deputy sheriff for larceny of property from a hardware store, the trial court adequately instructed the jury on defendant's defense that he was acting within his public authority when he took the items from the store. *S. v. Williams*, 613.

§ 128.2. Particular Grounds for Mistrial

Trial court did not err in failing to declare a mistrial because of a witness's non-responsive statement that she had received threatening telephone calls from defendant where the court granted defendant's motion to strike the statement and instructed the jury not to consider it. *S. v. Jorgenson*, 425.

§ 142.3. Particular Conditions of Probation; Conditions Held Proper

Where a condition of defendant's probation required her to submit to warrantless searches by her probation officer, a search of defendant's home was not unlawful because the probation officer was accompanied by four police officers who also participated in the search. *S. v. Howell*, 507.

§ 142.4. Improper Conditions of Probation

Trial court erred in revoking defendant's probation and activating his suspended sentence, since the condition of defendant's probation that he not operate a motor vehicle on the streets from 12:01 a.m. until 5:30 a.m. was an improper condition, not reasonably related to the offense of felonious possession of stolen credit cards of which he was convicted. *S. v. Cooper*, 233.

§ 145. Costs

Counsel is taxed with the cost of printing 18 pages in the record on appeal which had no bearing on the issues raised by the appeal. *S. v. Washington*, 458.

§ 149.1. Appeal by State Not Permitted

The State had no right to appeal an order granting defendant's motion to suppress evidence where the record failed to show that the prosecutor made the certification required by G.S. 15A-979(c). *S. v. Dobson*, 445.

§ 169.3. Error in Exclusion of Evidence Cured by Admission of Other Evidence

Defendant was not prejudiced by the exclusion of a warrant for arrest of the State's witness for felonious possession of the property allegedly stolen by defendant where the facts stated in the warrant were already before the jury. *S. v. Jorgenson*, 425.

DAMAGES

§ 12.1. Pleading Punitive Damages

In an action to recover under an insurance policy providing coverage for lightning damage where plaintiffs alleged that defendant elected to repair the damage to their property caused by lightning but caused additional damage in the attempted repair, plaintiffs did not establish a claim for punitive damages as there were no allegations of aggravated conduct. *Murray v. Insurance Co.*, 10.

Plaintiff's complaint was insufficient to state a claim for punitive damages for assault and battery. *Shugar v. Guill*, 466.

DEEDS

§ 22. Covenant of Seisin

The fact that 3 acres of the 6 acres of land conveyed in fee were subject to a highway right-of-way did not constitute a breach of the covenant of seisin. *Hawks v. Brindle*, 19.

§ 24. Covenants Against Encumbrances

Plaintiffs' evidence was sufficient to go to the jury on the issue of whether a highway right-of-way did not constitute a breach of the covenant of seisin. covenant against encumbrances. *Hawks v. Brindle*, 19.

DIVORCE AND ALIMONY

§ 16.6. Sufficiency of Evidence in Alimony Action

In an action for absolute divorce where defendant filed a counterclaim for permanent alimony on the ground of abandonment, evidence was sufficient to raise the reasonable inference that plaintiff brought the parties' cohabitation to an end without justification, without defendant's consent, and without any intention of resuming cohabitation at a later point. *Condie v. Condie*, 522.

§ 16.8. Finding, Ability to Pay

Evidence was sufficient to support the trial court's order that plaintiff should provide defendant with \$250 per month as reasonable support. *Condie v. Condie*, 522.

§ 20.2. Effect of Separation Agreements and Consent Decrees on Right to Alimony After Divorce

The evidence supported the trial court's determination that defendant's obligation under a consent judgment to pay plaintiff \$17,640 in 126 monthly installments of \$140 each did not constitute alimony but was part of a property settlement and that the periodic payments thus did not terminate under G.S. 50-16.9(b) upon the remarriage of plaintiff. *Allison v. Allison*, 622.

§ 23.6. Refusal to Take Jurisdiction in Child Custody Action; Forum Non Conveniens

The district court did not err in declining to exercise its jurisdiction in a child custody proceeding upon concluding that a Michigan court is a more convenient forum. *Pope v. Jacobs*, 374.

DIVORCE AND ALIMONY – Continued**§ 24.6. Sufficiency of Evidence in Child Support Action**

The trial court did not err in determining that the defendant father's fair share of child support for the three years immediately prior to suit was \$400.00 per month. *Stanley v. Stanley*, 172.

EASEMENTS**§ 13. Licenses**

A letter written by a stockholder in the company which purchased the property in question informing defendant that she had the company's permission to occupy the house and have a garden on the land but that no deed could be furnished her created a gratuitous license for defendant to use the property which did not survive the transfer of ownership of the property by the licensor. *Hill v. Smith*, 670.

ELECTRICITY**§ 3. Rates**

The Utilities Commission was correct in reducing a power company's rate base by increasing its depreciation reserve, and the Commission's determination that 14.1% was a fair rate of return on common equity was fully supported by the record. *Utilities Comm. v. Power Co.*, 698.

EVIDENCE**§ 47. Expert Testimony in General**

In response to properly phrased questions, an expert should be allowed to assist the jury in determining the duties of a competent appraiser. *Alva v. Cloninger*, 602.

FORGERY**§ 2. Prosecution and Punishment**

Presumption that defendant either forged or consented to the forging of a check when it is shown that defendant had a forged check in his possession and attempted to obtain money or advances upon it does not violate due process. *S. v. Roberts*, 221.

Trial court did not err in refusing to charge that when a defendant signs the name of another to an instrument it is presumed he did so with authority where defendant offered no evidence he signed the checks in question with authority. *Ibid.*

FRAUD**§ 12.1. Nonsuit**

Plaintiffs' evidence was insufficient for the jury in an action for fraud in the sale of land. *Hawks v. Brindle*, 19.

FRAUDS, STATUTE OF

§ 5. Contracts to Answer for Debt or Default of Another

Any agreement by the individual defendant to pay the debt of a corporation for truck repairs came within the statute of frauds and was void. *Bone International, Inc. v. Brooks*, 183.

GIFTS

§ 1. Gifts Inter Vivos

Where plaintiff alleged that defendant converted certain items of personal property belonging to plaintiff and refused to pay rent that was owed to plaintiff and past due but defendant contended that these items were gifts made to her by plaintiff's chief executive officer and controlling stockholder, trial court erred in failing to declare and explain the law of gift and erred in failing to submit the issue to the jury. *Pallet Co. v. Wood*, 702.

HOMICIDE

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

Evidence was sufficient to require submission of involuntary manslaughter to the jury where it tended to show that defendant pointed a rifle at a mobile home and it discharged, killing an occupant therein. *S. v. Cherry*, 118.

Evidence of involuntary manslaughter was sufficient to be submitted to the jury in a prosecution of defendant for the shooting of his wife. *S. v. McAdams*, 140.

§ 27.2. Instructions on Involuntary Manslaughter

Trial court's instructions on involuntary manslaughter were not confusing to the jury. *S. v. Cherry*, 118.

§ 28.8. Instructions on Accidental Death

Trial court in a homicide case erred in its instructions on death by accident or misadventure. *S. v. Cherry*, 118.

§ 30.3. Instructions on Manslaughter; Involuntary Manslaughter

Trial court in second degree murder case erred in submitting involuntary manslaughter to the jury, and where the jury found defendant guilty of involuntary manslaughter and acquitted defendant of all other degrees of homicide, defendant is entitled to be discharged. *S. v. Cason*, 144.

INDICTMENT AND WARRANT

§ 12.2. Amendment of Warrant

Trial court did not err in allowing the State to amend a warrant charging death by vehicle by striking an allegation of "following too closely" and adding an allegation of "failure to reduce speed to avoid an accident." *S. v. Clements*, 113.

§ 15. Timing of Motion to Dismiss Indictment

Defendant's motion to dismiss the indictment on the ground that it failed to charge a crime was timely although it was not made until the close of the evidence. *S. v. Brunson*, 413.

INFANTS

§ 18. Sufficiency of evidence of delinquency

Juvenile court erred in denying respondents' motions to dismiss for insufficiency of the evidence to sustain an adjudication of delinquency where respondents were accused of damaging automobiles being transported by rail by throwing rocks at the automobiles. *In re Meaut*, 153.

INSURANCE

§ 67.2. Accident Insurance; Sufficiency of Evidence

In an action to recover on a group accident insurance policy issued by defendant where plaintiff, a 53 year old meatcutter, alleged that he slipped on a wet floor at work, fell on his back, and became totally disabled, trial court erred in entering summary judgment for defendant. *McGee v. Insurance Co.*, 72.

§ 87. Liability Insurance; Drivers Insured

The evidence supported the trial court's determination that the wife of the owner of an insured automobile was a resident of the same household and thus was a "named insured" under the policy at the time the automobile was involved in a collision in New Mexico while being driven by the wife's boyfriend with the wife's permission. *Insurance Co. v. Allison*, 654.

§ 140.2. Actions on Hail Policies

In an action to recover from defendant farmer the amount of a payment made by plaintiff for hail damage to defendant's crops, there was no merit to defendant's contention that the court should find either that the "other insurance clause" in the hail insurance policy was void as being against public policy, or that the second policy written by another insurance company should be held void, leaving the first policy in force. *N.C. Grange Ins. Co. v. Johnson*, 447.

§ 142. Actions on Burglary and Theft Policies

Insured's evidence was insufficient to show a theft by burglary within the meaning of an insurance policy which required proof of entry or exit by force and violence or by visible marks or physical damage to the premises. *Norman v. Banasik*, 197.

JUDGMENTS

§ 21.1. Attack on Consent Judgment; Want of Consent

Defendant's motion 23 months after a consent judgment was entered to set aside the judgment on the ground defendant did not consent thereto was not made within a reasonable time as required by Rule 60(b)(4), and the trial court thus had no authority to entertain and allow the motion. *Nickels v. Nickels*, 690.

§ 37.5. Preclusion or Relitigation of Issues; Real Property Rights

A consent judgment in a divorce action was res judicata and estopped plaintiff from bringing an action against the wife relitigating issues concerning ownership of certain farm property. *Hill v. Lassiter*, 34.

JURY

§ 3.1. Competency and Qualification of Jurors

The trial court erred when it failed to follow the procedure mandated by G.S. 15A-1214 for the selection of the jury, but such error was not prejudicial where defendant failed to exercise all of his peremptory challenges. *S. v. Stephens*, 244.

§ 5.1. Selection of Jurors

Defendant was not prejudiced by the court's error in beginning the jury selection process with only eleven members of the jury panel present. *S. v. Campbell*, 418.

§ 8. Impaneling Jury

Failure to impanel the jury constituted prejudicial error. *S. v. Stephens*, 244.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

G.S. 14-39(a) authorizes a kidnapping conviction whenever the defendant has committed at least one of the underlying acts of either confinement, restraint, or removal for a proscribed purpose. *S. v. Easter*, 190.

LARCENY

§ 4. Warrant and Indictment

An indictment which charged defendant with the felony of 28 blank company checks was sufficient to sustain a conviction of misdemeanor larceny, although the indictment did not allege the value of the property stolen. *S. v. Daniels*, 294.

§ 6.1. Competency of Evidence

The manager of a mobile home dealership was properly permitted to describe pillows, curtains and a bedspread found in defendant's car as being identical to those taken from a mobile home on the dealer's lot. *S. v. Douglas*, 594.

A church trustee was properly permitted to state his opinion that two stereo speakers stolen from the church had a value of about \$200 each. *S. v. Harper*, 493.

§ 8. Instructions

Larceny of a firearm is a felony regardless of the value of the weapon stolen and without regard to whether the larceny was accomplished by means of a felonious breaking or entering. *S. v. Robinson*, 567.

§ 8.1. Instructions as to Felonious Intent

In a prosecution of a deputy sheriff for larceny of property from a hardware store, the trial court adequately instructed the jury on defendant's defense that he was acting within his public authority when he took the items from the store. *S. v. Williams*, 613.

LARCENY – Continued

§ 8.3. Instructions as to Value of Property

In a prosecution for larceny committed pursuant to a breaking and entering, the trial court's erroneous instruction that the State had to prove that defendant took and carried away all the items of personal property described in the indictment in order to find defendant guilty of felonious larceny was favorable to defendant and did not prejudice him. *S. v. Jorgenson*, 425.

§ 9. Verdict

Where defendant was acquitted of felonious breaking or entering, he could not be convicted of felonious larceny based on the felonious breaking or entering charge, and the jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny. *S. v. Cornell*, 108.

LIBEL AND SLANDER

§ 11. Absolute Privilege

An absolute privilege attached to the warrant charging plaintiff with refusing to obey an order of a police officer to move her vehicle so that plaintiff's alleged claim for libel because of the warrant was barred by such privilege. *Jones v. City of Greensboro*, 571.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action

Plaintiff's claim based on failure of defendant, his former father-in-law, to convey a tract of land to him in fee was barred by the statute of limitations, but plaintiff's claim based on failure of defendant to convey to him his retained life estate in the property was not so barred. *Hill v. Lassiter*, 34.

§ 4.1. Accrual of Tort Cause of Action

Plaintiff's claims for false arrest, false imprisonment, assault, and libel were all barred by the one-year statute of limitations. *Jones v. City of Greensboro*, 571.

§ 4.2. Accrual of Negligence Actions

Trial court erred in dismissing plaintiffs' negligence and strict liability claims for personal injuries allegedly caused by the defective condition of a vehicle purchased from defendant dealer on the ground the claims were barred by the three-year statute of limitations. *Gillespie v. American Motors Corp.*, 535.

MALICIOUS PROSECUTION

§ 13.1. Validity of Warrant; Sufficiency of Evidence

Evidence presented by plaintiff was insufficient to require submission to the jury on her claim for malicious prosecution where a warrant issued against plaintiff did not accurately and clearly allege all the constituent elements of an offense, was therefore invalid, and could not support an action for malicious prosecution. *Jones v. City of Greensboro*, 571.

§ 13.3. Malice; Sufficiency of Evidence

In an action for malicious prosecution arising from plaintiff's arrest for her

MALICIOUS PROSECUTION – Continued

alleged refusal to follow orders by defendant police officer to move her car, evidence was sufficient to raise questions for the jury to determine regarding the existence of malice, either actual or imputed, and the existence of the other essential elements of malicious prosecution. *Jones v. City of Greensboro*, 571.

MASTER AND SERVANT

§ 49.1. Status of Persons Within Compensation Act

The lessor-driver of tractor-trailer equipment, under a trip-lease agreement with an interstate commerce carrier, is deemed to be an employee of the carrier for worker's compensation purposes while operating the equipment under the carrier's ICC authority. *Smith v. Central Transport*, 316.

§ 55.6. Meaning of "In the Course of" Employment

The evidence supported a determination by the Industrial Commission that plaintiff truck driver was acting within the course of his employment at the time he was injured in an accident while driving a truck as an assistant to defendant employer's regularly dispatched driver. *McNinch v. Henredon Industries*, 250.

§ 58. Intoxication of Employees

Industrial Commission did not err in finding and concluding that the accident resulting in an employee's death was caused by a small pickup truck pulling in front of deceased, nor did it err in finding and concluding that deceased's death was not proximately caused by intoxication. *Smith v. Central Transport*, 316.

§ 59. Negligence or Wilful Act of Fellow Employee

Evidence was sufficient to support finding of the Industrial Commission that an accident suffered by plaintiff did not arise out of and in the course of his employment where plaintiff was assaulted by a fellow employee. *Yelverton v. Furniture Co.*, 675.

§ 63. Injuries on Highway

Evidence was sufficient to support the finding and conclusion of the Industrial Commission that deceased's motor vehicle accident occurred in the course and scope of his employment. *Smith v. Central Transport*, 316.

§ 68. Occupational Diseases

Plaintiff should be compensated for his permanent and total disability under G.S. 97-29 as it read in 1978 when his disability became permanent and total, rather than as it read in 1970 when he first became disabled and was entitled to compensation for partial disability under G.S. 97-30. *Smith v. American and Efird Mills*, 480.

§ 72. Partial Disability

An award of compensation for a ten percent permanent partial disability of plaintiff's right knee was supported by medical reports. *Mayo v. City of Washington*, 402.

MASTER AND SERVANT – Continued**§ 75. Medical and Hospital Expenses**

In a workers' compensation case there was no merit to defendant's argument that medical expenses should be compensated only to the extent they would tend to lessen the period of disability, since, if a plaintiff is found to be totally and permanently disabled, he will be entitled to medical expenses for life, dating from the time he became totally disabled, subject only to the requirements of G.S. 97-29 that the expenses be "reasonable and necessary." *Smith v. American and Efird Mills*, 480.

§ 93.2. Admissibility of Evidence

Testimony by the regularly dispatched driver of a truck that he intended to comply with defendant employer's regulations relating to carrying an unauthorized person in his truck in an emergency situation was competent on the question of whether plaintiff was acting within the course of his employment at the time of an accident while plaintiff was driving the truck as an assistant to the regularly dispatched driver. *McNinch v. Henredon Industries*, 250.

§ 94. Finding of Commission

Where all the evidence tended to show that plaintiff became totally and permanently disabled in 1978, but the Industrial Commission did not find as a fact that plaintiff was so disabled, the case must be remanded for a finding of fact on the issue of whether, and if so when, plaintiff became totally and permanently disabled. *Smith v. American and Efird Mills*, 480.

§ 94.3. Rehearing and Review by Commission

On appeal to the full Industrial Commission, plaintiff was not entitled to a hearing and consideration of his case de novo since plaintiff at no time filed a written request, supported by affidavit, setting forth the grounds for a hearing de novo. *Yelverton v. Furniture Co.*, 675.

§ 96.5. Specific Instances Where Findings Are Conclusive

The evidence in a workers' compensation hearing supported findings that plaintiff policeman injured his knee by accident arising out of and in the course of his employment and that subsequent injuries to his knee were the direct and natural results of the original injury. *Mayo v. City of Washington*, 402.

§ 108.1. Effect of Misconduct on Right to Compensation

Claimant's actions in threatening a fellow employee with bodily harm, leaving his assigned work area for the purpose of going to another work area to harass a fellow employee, and picking up a wooden post in the course of an argument with the fellow employee constituted "misconduct connected with his work" within the meaning of G.S. 96-14 sufficient to disqualify him from receiving unemployment compensation benefits. *Yelverton v. Furniture Industries*, 215.

§ 111. Appeal and Review

Superior court had no authority to entertain claimant's appeal and enter its order reversing decision of the Employment Security Commission since claimant's notice of appeal was not timely. *In re Browning*, 161.

MECHANICS' LIENS

§ 2. Priorities and Enforcement

Where the purchaser of personal property which is subject to a perfected security interest buys in the collateral at a foreclosure sale of a mechanics' lien conducted to satisfy an account for repairs which the purchaser has failed to pay for a purchase price which essentially represents payment of the account, the purchaser does not thereby extinguish the security interest. *Financial Corp. v. Harnett Transfer*, 1.

MUNICIPAL CORPORATIONS

§ 4.5. Housing and Urban Development

Prior appellate decisions rendered void the entire exchange of real property between a municipal redevelopment commission and a church. *Campbell v. Church*, 393.

§ 9.1. Police Officers

Trial court erred in dismissing plaintiff's claim for relief for failure to state a claim upon which relief could be granted where plaintiff alleged that police officers were permitted to wear the uniform of the city police department while engaged in part-time jobs with various businesses within the city and they thereby misrepresented to the public a continuation of the authority vested in an on duty police officer to an off duty police officer. *Jones v. City of Greensboro*, 571.

NARCOTICS

§ 3.1. Competency of Evidence

Trial court did not err in permitting an officer to testify concerning needle marks on defendant's arm. *S. v. Lee*, 344.

In a prosecution of defendant for feloniously acquiring possession of a controlled substance, trial court did not err in admitting testimony concerning the reputation of a house and a neighborhood as being an area of frequent drug use. *Ibid.*

§ 4. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for feloniously manufacturing marijuana. *S. v. Whitfield*, 241.

In a prosecution of defendant for feloniously acquiring possession of a controlled substance, there was no merit to defendant's contention that, since the pharmacist knew the prescription presented by defendant was invalid before filling it, defendant did not violate G.S. 90-108(a)(10). *S. v. Lee*, 344.

§ 4.3. Sufficiency of Evidence of Constructive Possession

In a prosecution for the manufacture of marijuana, evidence was sufficient for the jury to find that defendant was in constructive possession of a marijuana patch growing behind his trailer. *S. v. Owen*, 429.

NEGLIGENCE**§ 2. Negligence Arising From Performance of a Contract**

Evidence was sufficient for the jury in plaintiffs' action to recover for negligent performance of a contract entered into by a lending institution and defendant-appraiser to appraise a house which plaintiffs intended to purchase. *Alva v. Cloninger*, 602.

§ 27. Competency and Relevancy of Evidence

In an action to recover for property damages based on negligence in the installation of tires on plaintiffs' truck by defendant, the trial court erred in excluding testimony by plaintiffs' witness that he checked the tire in question before the trip giving rise to the accident and it did not appear to be flat or leaking air. *Walters v. Tire Sales & Service*, 378.

§ 29.1. Evidence of Negligence Sufficient

Evidence was sufficient for the jury in an action to recover for property damage based on negligence in the installation of tires by defendant on plaintiff's truck. *Walters v. Tire Sales & Service*, 378.

§ 29.2. Evidence of Negligence Insufficient

Trial court properly entered summary judgment for defendants in plaintiff's action to recover for injuries to his hand sustained when he was struck by a discharge from an airless paint sprayer. *Strickland v. Equipment Development*, 57.

§ 29.3. Sufficiency of Evidence of Proximate Cause

In an action to recover property damages resulting from an accident caused by a tire blowout, there was no merit to defendant's contention that plaintiffs failed to establish a causal connection between the action of defendant and the accident in question. *Walters v. Tire Sales & Service*, 378.

§ 57.10. Action by Invitee; Evidence Sufficient

Evidence was sufficient to be submitted to the jury in an action to recover for personal injuries sustained by plaintiff when she stepped on a defective electric cord in a laundromat and experienced a shock. *Cantey v. Barnes*, 356.

§ 57.11. Action by Invitee; Evidence Insufficient

Plaintiff was not entitled to recover for injuries sustained during a tree cutting accident, since defendants were not under a duty to warn plaintiff of the dangerous situation. *Mazzucco v. Purcell*, 42.

§ 58.1. Instructions in Actions by Invitees

In plaintiff's action to recover for personal injuries sustained when she received an electrical shock in defendant's laundromat, the trial court gave adequate instructions on the issue of negligence and the duty owed an invitee. *Cantey v. Barnes*, 356.

PARTITION**§ 6. Opinion as to Value**

A cotenant was qualified to state an opinion as to whether the apportionment of a tobacco allotment among the individual tracts would increase or decrease the value of the entire property. *Harris v. Harris*, 103.

PARTITION – Continued

§ 6.1. Necessity for Sale

Trial court's use of the term "prejudice" rather than "injury" in determining that land should be sold rather than partitioned in kind did not render the court's order invalid. *Harris v. Harris*, 103.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

Invoices billing a corporation for truck repair work established knowledge on the part of the agent of plaintiff who filled out the invoices that defendant's trucking business was being carried on as a corporation, and the knowledge of plaintiff's agent was imputed to plaintiff. *Bone International, Inc. v. Brooks*, 183.

PROCESS

§ 9.1. Minimum Contacts Test

The trial court had personal jurisdiction over the nonresident defendant in an action to recover damages because of the wrongful removal of plaintiff's child from North Carolina in violation of a child custody order. *Fungaroli v. Fungaroli*, 363.

§ 19. Actions for Abuse of Process

Evidence presented by plaintiff was insufficient to require submission to the jury of her claim for abuse of process where plaintiff presented no evidence upon which an inference could be drawn as to either ulterior purpose on the part of defendant police officer or the City of Greensboro or any improper act by them in the use of either of two warrants in the course of plaintiff's prosecution. *Jones v. City of Greensboro*, 571.

PROFESSIONS AND OCCUPATIONS

§ 2. Regulation of Contractors

Defendants were barred from asserting their claims under a contract to construct a dwelling for plaintiffs, since defendants were unlicensed general contractors and the price of the construction was in excess of \$30,000. *Roberts v. Heffner*, 646.

A builder who is unable or unwilling to obtain a general contractor's license from the State of N.C. should not be allowed to thwart the plain intent of G.S. 87-1 by the artifice of contracting to build a residence for another on the builder's land. *Ibid.*

PUBLIC OFFICERS

§ 11. Criminal Liability of Public Officers

In a prosecution of a deputy sheriff for larceny of property from a hardware store, the trial court adequately instructed the jury on defendant's defense that he was acting within his public authority when he took the items from the store. *S. v. Williams*, 613.

RAPE**§ 4.1. Proof of Other Acts and Crimes**

Testimony by a State's witness that defendant wore a plaid jacket and used the term "Baby Girl" when he raped her some two months before the crimes in question was not competent in a prosecution for second degree rape and second degree sexual assault. *S. v. Pace*, 79.

§ 5. Sufficiency of Evidence

State's evidence in a prosecution for second degree rape and second degree sexual offense was sufficient to show that the acts against the victim were committed by force and against her will. *S. v. Pace*, 79.

§ 6.1. Instructions on Lesser Degrees of Crime

In a prosecution for second degree rape based on allegations that defendant aided and abetted a co-defendant in the commission of a rape, trial court erred in failing to instruct on the lesser included offense of assault with intent to commit rape where substantial evidence presented at trial tended to show that defendant was not present at the time of penetration. *S. v. Williams*, 397.

§ 18.4. Instructions on Lesser Included Offenses

The trial court in a prosecution for assault with intent to commit rape erred in failing to charge the jury on the lesser offense of simple assault. *S. v. Little*, 64.

§ 19. Taking Indecent Liberties With Child

The evidence was sufficient to support a jury finding that defendant took indecent liberties with three children "for the purpose of arousing or gratifying sexual desire." *S. v. Campbell*, 418.

RECEIVING STOLEN GOODS**§ 2. Indictment**

When a defendant is charged with a violation of the receiving portion of the financial transaction card theft statute, it must be alleged that he received a card from a third party who also intended to use it. *S. v. Brunson*, 413.

§ 4. Competency of Evidence

A church trustee was properly permitted to state his opinion that two stereo speakers stolen from the church had a value of about \$200 each. *S. v. Harper*, 493.

§ 5.1. Sufficiency of Evidence

Evidence was sufficient for the jury to find that stereo speakers stolen from a church had a value of more than \$400. *S. v. Harper*, 493.

ROBBERY**§ 3. Competency of Evidence**

The location of a shed in which a gun and gloves used in a robbery were found in relation to the residence in which defendant was found was relevant in a prosecution of defendant for armed robbery. *S. v. Coasey*, 450.

ROBBERY – Continued**§ 4.3. Armed Robbery; Evidence Sufficient**

The State's evidence was sufficient for the jury in a prosecution of defendant for armed robbery of a taxicab driver. *S. v. Coasey*, 450.

RULES OF CIVIL PROCEDURE**§ 15.2. Amendments to Conform to Evidence**

Trial court erred in refusing to allow plaintiffs to amend their pleadings to conform with the evidence. *Trucking Co. v. Phillips*, 85.

§ 50. Motions for Directed Verdict

Plaintiff's motion after a mistrial was declared for judgment in accordance with its motion for directed verdict was proper. *Financial Corp. v. Harnett Transfer*, 1.

§ 55. Default

Where defendant failed to file answer within the time provided, she thereby admitted the averments of plaintiff's complaint, and entry of default was appropriate. *Hasty v. Carpenter*, 333.

§ 55.1. Setting Aside Default

The trial court did not err in refusing to set aside an entry of default by the clerk of court on the ground of excusable neglect of counsel. *Lumber Co. v. Grizzard*, 561.

§ 59. New Trials

Defendant's letter to the clerk of court was not a written notice of appeal of a divorce judgment but was a Rule 59 motion for a new trial. *Williford v. Williford*, 150.

§ 60. Relief from Judgment or Order

In ruling on a motion to set aside a default judgment, the trial court had no authority to determine whether defendant had made an appearance in the case where the court which entered the default judgment had previously ruled that defendant had made no appearance. *Whitfield v. Wakefield*, 124.

Where the district court entered a judgment against defendant for delinquent taxes plus costs, including a fee of \$350 for plaintiff town's attorney, another district court judge did not have authority under Rule 60(b) to modify the prior judgment as to the amount of the attorney's fee. *Town of Sylva v. Gibson*, 545.

§ 60.1. Timeliness of Motion for Relief from Judgment

Defendant's motion 23 months after a consent judgment was entered to set aside the judgment on the ground defendant did not consent thereto was not made within a reasonable time as required by Rule 60(b)(4), and the trial court thus had no authority to entertain and allow the motion. *Nickels v. Nickels*, 690.

§ 60.2. Grounds for Relief from Judgment

Trial court had no authority under Rule 60(b)(6) to set aside a default judgment against a nonresident defendant on the ground that a letter sent to

RULES OF CIVIL PROCEDURE – Continued

plaintiff by defendant constituted an appearance and defendant received no written notice of plaintiff's application for judgment by default. *Whitfield v. Wakefield*, 124.

SALES**§ 14.1. Action for Breach of Warranty**

An action for breach of warranty in the sale of an automobile was governed by the four-year statute of limitations of G.S. 25-2-725. *Gillespie v. American Motors Corp.*, 535.

SCHOOLS**§ 13.2. Dismissal of Teacher**

The decision of defendant board of education to dismiss plaintiff career teacher for neglect of duty because he failed to return to his classes after his indictment on felony drug charges was unsupported by substantial evidence. *Overton v. Board of Education*, 303.

SEARCHES AND SEIZURES**§ 2. Searches by Resident Advisor**

Trial court erred in excluding evidence which was discovered by a resident advisor in a university dorm and which was seized by campus police who had obtained a search warrant for defendant's room on the basis of the resident advisor's information. *S. v. Keadle*, 660.

§ 10. Search and Seizure on Probable Cause

Officers had sufficient probable cause "particularized" to defendant to search defendant's person after executing a warrant to search a private residence. *S. v. Brooks*, 90.

§ 11. Search and Seizure of Vehicles

An officer had probable cause to stop the car in which defendants were riding, and property in plain view within the vehicle was lawfully seized and properly admitted into evidence. *S. v. Snowden and S. v. Boggs*, 511.

§ 12. "Stop and Frisk" Procedures

An officer had a reasonable suspicion that defendant was engaged in criminal activity so as to justify an investigatory stop of a car driven by defendant at 12:34 a.m. with a washing machine in the trunk and a dryer in the rear passenger area of vehicle. *S. v. Douglas*, 594.

§ 13. Search and Seizure by Consent

Where a condition of defendant's probation required her to submit to warrantless searches by her probation officer, a search of defendant's home was not unlawful because the probation officer was accompanied by four police officers who also participated in the search. *S. v. Howell*, 507.

§ 34. Search of Vehicle

A washer and dryer were lawfully seized from defendant's car without a

SEARCHES AND SEIZURES – Continued

warrant pursuant to the plain view rule after an officer had made a proper investigatory stop of defendant's car. *S. v. Douglas*, 594.

§ 39. Places Which May Be Searched

The search of defendant's person after the search of a private residence for narcotics pursuant to a warrant was authorized by G.S. 15A-256. *S. v. Brooks*, 90.

SOCIAL SECURITY AND PUBLIC WELFARE**§ 1. Generally, Benefits Reduced**

AFDC benefits paid to plaintiff were improperly reduced by \$87 a month because of food contributions by the stepfather of plaintiff's children on the basis of a contradictory and incomplete letter from the stepfather. *Lyons v. Morrow, Sec. of Human Resources*, 679.

TAXATION**§ 22.1. Educational Institution Property**

A portion of a football stadium parking lot leased by Wake Forest University to a corporation but not regularly used by the corporation is exclusively used for educational purposes and is exempt from ad valorem taxation. *In re Wake Forest University*, 516.

§ 24.2. Permanence of Location for Property

The tax situs of piece goods and finished goods of a broker of high fashion jeans remained in Mecklenburg County while the goods were outside North Carolina on the tax date being stitched or laundered, and the good were thus subject to ad valorem taxation in Mecklenburg County. *In re Plushbottom and Peabody*, 285.

§ 27. Inheritance, Estate, and Gift Taxes

Where an executrix paid deceased's wife a sum from the estate in settlement of her claims as surviving spouse and the wife thereafter withdrew her dissent, no property was transferred from deceased's estate by intestacy pursuant to a valid dissent, and inheritance taxes were required to be computed on the estate solely in accordance with the terms of deceased's will. *Greene v. Lynch, Sec. of Revenue*, 665.

§ 31. Sales and Use Taxes

Plaintiff's claim as trustee for the Secretary of Revenue to recover sales taxes from defendant was properly dismissed where plaintiff had previously paid the sales taxes and penalty. *Carolina-Atlantic Distributors v. Teachey's Insulation*, 705.

Plaintiff retailer could not collect from defendant purchaser for sales taxes on insulating materials sold by plaintiff to defendant where plaintiff failed to add sales taxes to the sales price of the insulating material at the "time of selling or delivering or taking an order" as required by G.S. 105-164.7. *Carolina-Atlantic Distributors v. Teachey's Insulation*, 705.

TAXATION – Continued**§ 41. Foreclosure of Tax Lien**

The amount of an attorney's fee awarded in a tax foreclosure proceeding under G.S. 105-374 is to be determined pursuant to G.S. 105-374(i) in the discretion of the trial court and is not limited by the provisions of G.S. 6-21.2. *Town of Sylva v. Gibson*, 545.

§ 25.4. Valuation and Assessment of Property Taxes

Notice published in a newspaper in September 1974 that schedules for the revaluation of property in the county, which would be effective on 1 January 1977, had been adopted by the county commissioners met statutory requirements and did not violate due process. *In re McElwee*, 163.

Although appraisers failed to visit or observe petitioners' land in appraising it for ad valorem taxation, the record as a whole supported a determination by the Property Tax Commission that the land was properly valued as forest land at \$100 per acre. *Ibid*.

TORTS**§ 7.2. Avoidance of Release; Effect of Fraud or Mistake**

In an action to recover damages for injuries sustained by plaintiff wife in an automobile accident, trial court erred in dismissing her claim on the basis of a release given to plaintiff husband's insurer in exchange for cash, and trial court erred in excluding an affidavit by which plaintiff wife attempted to show that the release was procured by fraud or executed pursuant to a mutual mistake of facts. *Cunningham v. Brown*, 264.

TRIAL**§ 42.2. Quotient Verdict**

In an action to recover damages arising out of an automobile accident, the trial court's granting of a new trial on the issue of damages on the ground that the jury returned a quotient verdict was erroneous. *Seaman v. McQueen*, 500.

UNFAIR COMPETITION**§ 1. Unfair Trade Practices**

Plaintiff's complaint stated a claim for relief against defendant bank and defendant mortgage lender for civil conspiracy to deny plaintiffs a loan and for treble damages under the unfair trade practices statute. *Pedwell v. First Union Natl. Bank*, 236.

UNIFORM COMMERCIAL CODE**§ 25. Buyer's Remedy for Breach of Warranty**

An action for breach of warranty in the sale of an automobile was governed by the four-year statute of limitations of G.S. 25-2-725. *Gillespie v. American Motors Corp.*, 535.

§ 35. Liability of Accommodation Parties

In an action to recover the amount of a note signed by the parties, trial

UNIFORM COMMERCIAL CODE – Continued

court erred in directing verdict for plaintiff where the jury could find that defendant had signed as an accommodation maker, thus preventing defendant from being liable to plaintiff. *Lowe v. Peeler*, 557.

§ 45. Default and Enforcement of Security Interest

Where the purchaser of personal property which is subject to a perfected security interest buys in the collateral at a foreclosure sale of a mechanics' lien conducted to satisfy an account for repairs which the purchaser has failed to pay for a purchase price which essentially represents payment of the account, the purchaser does not thereby extinguish the security interest. *Financial Corp. v. Harnett Transfer*, 1.

UTILITIES COMMISSION**§ 25. Establishment of Rate Base**

The Utilities Commission was correct in reducing a power company's rate base by increasing its depreciation reserve, and the Commission's determination that 14.1% was a fair rate of return on common equity was fully supported by the record. *Utilities Comm. v. Power Co.*, 698.

WATERS AND WATERCOURSES**§ 3. Natural Streams; Reasonable Use of Water**

The Environmental Management Commission did not act arbitrarily or capriciously in deciding not to declare the Yadkin River Basin a capacity use area. *High Rock Lake Assoc. v. Environmental Management Comm.*, 275.

WILLS**§ 61. Dissent of Spouse**

There was no valid dissent by a wife from her deceased husband's will where the executrix paid the wife a sum from the estate in settlement of her claim as surviving spouse and the wife withdrew her dissent and waived any further right to dissent. *Greene v. Lynch, Sec. of Revenue*, 665.

§ 61.4. Effect of Spouse's Election

Trial court properly entered an order of summary ejectment against defendant who had occupied the land in question for 55 years since defendant accepted a check representing the amount of a bequest to her under the will of her husband, pursuant to the terms of the will defendant was given no interest in the land in question, and by electing to take under the will defendant was precluded from dissenting from the will. *Hill v. Smith*, 670.

WITNESSES**§ 1. Competency of Witnesses**

Trial court in a prosecution for rape of a mentally retarded female did not have the authority to grant defendant's motion to require a psychiatric examination of the alleged victim. *S. v. Clontz*, 639.

WORD AND PHRASE INDEX

ABDUCTION OF CHILD

Action for wrongful removal of child from this State, *Fungaroli v. Fungaroli*, 363.

ACCIDENT INSURANCE

Cause of meatcutter's disability, *McGee v. Insurance Co.*, 72.

AD VALOREM TAXES

Attorney fees for collection of delinquent taxes, *Town of Sylva v. Gibson*, 545.

Failure of appraisers to visit property, *In re McElwee*, 163.

Sufficiency of newspaper notice of schedules, *In re McElwee*, 163.

Tax situs of jeans outside N.C. for stitching, *In re Plushbottom and Peabody*, 285.

University's rental of parking lot, portion exempt from taxation, *In re Wake Forest University*, 516.

AFDC BENEFITS

Reduction for food stamps purchased by stepfather, *Lyons v. Morrow, Sec. of Human Resources*, 679.

AGE

Officer's opinion as to, *S. v. Campbell*, 418.

ALIMONY

Consent order, payments as part of property settlement rather than alimony, *Allison v. Allison*, 622.

APPEAL AND ERROR

Notice of appeal not timely, *Byrd v. Byrd*, 707.

Order adjudicating fewer than all claims, *Cunningham v. Brown*, 264.

Order dismissing counterclaims but allowing set-offs, *Roberts v. Heffner*, 646.

Order entered after notice of appeal given, *Condie v. Condie*, 522.

Partition sale, appeal premature, *Boyce v. Boyce*, 422.

APPEARANCE

Motion to set aside default judgment, prior ruling on appearance by another judge, *Whitfield v. Wakefield*, 124.

ARBITRATION

Business dealings of arbitrator with plaintiff, knowledge by defendant, *Thomas v. Howard*, 350.

ASSAULT AND BATTERY

Assault by fellow employee not compensable accident, *Yelverton v. Furniture Co.*, 675.

Claim barred by statute of limitations, *Jones v. City of Greensboro*, 571.

Defendant's affair with victim's wife, *S. v. Lednum*, 387.

Evidence not supporting assault with deadly weapon inflicting serious injury, *S. v. Glenn*, 694.

Failure to instruct on victim as dangerous man, *S. v. Powell*, 224.

Knife as deadly weapon per se, *S. v. Lednum*, 387.

Provocation in mitigation of damages, *Shugart v. Guill*, 466.

ASSAULT WITH INTENT TO RAPE

Necessity for instructing on simple assault, *S. v. Little*, 64.

ATTORNEY FEES

Acceptance of offer of judgment, allowance as part of costs, *Yates Motor Co. v. Simmons*, 339.

Collection of delinquent taxes, authority of another judge to modify fees, *Town of Sylva v. Gibson*, 545.

ATTORNEYS AT LAW

Appearance of foreign attorney without meeting statutory requirements, harmless error, *Pope v. Jacobs*, 374.

Deletion of name from indigent appointment list, *Noell v. Winston*, 455.

Judgment against indigent defendant for counsel fees, notice and hearing, *S. v. Washington*, 458.

**AUTOMOBILE LIABILITY
INSURANCE**

Vehicle driven by boyfriend of insured's spouse, *Insurance Co. v. Allison*, 654.

AUTOMOBILES

Cars changing lanes on interstate, *Trucking Co. v. Phillips*, 85.

Condition of highway after accident, *Trucking Co. v. Phillips*, 85.

Driving under influence, *S. v. Fenner*, 156.

Entering intersection on red light, *Seaman v. McQueen*, 500.

Last clear chance, *S. v. Cornell*, 108.

Motorcycle near center of highway, *Burrow v. Jones*, 549.

Passing vehicle turning into driveway, *Spruill v. Summerlin*, 452.

AUTOMOBILES – Continued

Reckless driving not lesser offense of driving under influence, *S. v. Donald*, 238.

Release by husband not binding on wife, *Cunningham v. Brown*, 264.

Sale of vehicle without assigning manufacturer's statement of origin, *American Clipper Corp. v. Howerton*, 539.

BASTARDY PROCEEDING

Failure to support illegitimate, acquittal in criminal case not res judicata in civil action, *Stephens v. Worley*, 553.

BREAKING OR ENTERING

Acquittal of felonious breaking or entering precludes conviction of felonious larceny, *S. v. Cornell*, 108.

Mobile home as building, *S. v. Douglas*, 594.

Sufficiency of evidence, *S. v. Costigan*, 443.

BREATHALYZER TEST

Admissibility of result in wrongful death action, *Trucking Co. v. Phillips*, 85.

Refusal to submit to test, failure to show warnings to defendant, *S. v. Simmons*, 440.

Willful refusal to submit, *Sermons v. Peters, Comr. of Motor Vehicles*, 147.

BROKERS

Right of real estate broker to commission, *Jaudon v. Swink*, 433.

**BURGLARY AND THEFT
INSURANCE**

Failure to show entry or exit by force and violence, *Norman v. Banasik*, 197.

CAPACITY USE AREA

Failure to declare Yadkin River basin as, *High Rock Lake Assoc. v. Environmental Management Comm.*, 275.

CHILD CUSTODY

Refusal to exercise jurisdiction, more convenient forum, *Pope v. Jacobs*, 374.

CHILD SUPPORT

Award proper, *Stanley v. Stanley*, 172.
Determination of father's fair share, *Stanley v. Stanley*, 172.
Reimbursement of mother, *Stanley v. Stanley*, 172.

COMPLAINT

Amendment improperly denied, *Trucking Co. v. Phillips*, 85.

CONFESSION

Spontaneous statement in police custody, *S. v. Glenn*, 694.

CONFIDENTIAL INFORMANT

Disclosure required where informant was present during drug sale, *S. v. Hodges*, 229.

CONSENT JUDGMENT

Reasonable time for motion to set aside, *Nickels v. Nickels*, 690.

CONSENT ORDER

Whether payments are alimony or property settlement, *Allison v. Allison*, 622.

CONTINUANCE

Denial to obtain transcript of prior trial, *S. v. Williams*, 613.
Motion not timely, *S. v. Berry*, 97.

CONTRACTORS

Claims by unlicensed general contractor, *Roberts v. Heffner*, 646.

CONTRACTS

Appraisal contract not for benefit of third person, *Alva v. Cloninger*, 602.
Breach of contract to supply uniforms, *Uniform Service v. Bynum International, Inc.*, 203.
Claims by unlicensed general contractor, *Roberts v. Heffner*, 646.

CORPORATIONS

Knowledge of corporate ownership of repaired trucks, *Bone International, Inc. v. Brooks*, 183.

COSTS

Acceptance of offer of judgment, attorney fees as part of costs, *Yates Motor Co. v. Simmons*, 339.

COUNSEL, RIGHT TO

Defendant given suspended sentence, *S. v. Black*, 687.
Waiver of right to counsel, change of mind at trial, *S. v. Atkinson*, 683.

COVENANT AGAINST ENCUMBRANCES

Land subject to highway right-of-way, *Hawks v. Brindle*, 19.

CREDIT CARDS

Indictment for receiving stolen card, *S. v. Brunson*, 413.

DAMAGES

Assault and battery, evidence of provocation in mitigation of damages, *Shugar v. Guill*, 466.

Measure for breach of contract to assume mortgages, *Coley v. Eudy*, 310.

Punitive damages, *Murray v. Insurance Co.*, 10.

DEATH BY VEHICLE

Amendment of warrant as to traffic violation, *S. v. Clements*, 113.

Failing to reduce speed to avoid accident, *S. v. Clements*, 113.

DEFAULT JUDGMENT

Motion for relief from, *Whitfield v. Wakefield*, 124.

Ruling by another judge on appearance by defendant, *Whitfield v. Wakefield*, 124.

DEPUTY SHERIFF

Larceny trial, instructions on public authority defense, *S. v. Williams*, 613.

DIRECTED VERDICT

Motion for after mistrial, *Financial Corp. v. Harnett Transfer*, 1.

DISABILITY INSURANCE

Cause of meatcutter's disability, *McGee v. Insurance Co.*, 72.

DISCOVERY

Opportunity to conduct not denied, *S. v. Berry*, 97.

DIVORCE AND ALIMONY

Evidence of abandonment sufficient, *Condie v. Condie*, 522.

Evidence sufficient to support alimony award, *Condie v. Condie*, 522.

DOUBLE JEOPARDY

Fourth trial after three mistrials, *S. v. Williams*, 613.

Guilty plea to failure to yield right-of-way, trial for death by vehicle, *S. v. Griffin*, 564.

Misdemeanor dismissed, felony charge by subsequent warrant and indictment, *S. v. Lee*, 344.

Two offenses arising from one transaction, *S. v. Glenn*, 694.

DRIVING UNDER INFLUENCE

Evidence sufficient, *S. v. Fenner*, 156.

Reckless driving not lesser included offense, *S. v. Donald*, 238.

ELECTRIC RATES

Increase in depreciation reserve, *Utilities Comm. v. Power Co.*, 698.

EMPLOYMENT SECURITY COMMISSION

Appeal from decision not timely, *In re Browning*, 161.

ENCUMBRANCES

Covenant against, land subject to highway right-of-way, *Hawks v. Brindle*, 19.

ENTRAPMENT

Jury question in prosecution for sale of cocaine, *S. v. Grier*, 209.

ENTRY OF DEFAULT

No right of immediate appeal, *Looper v. Looper*, 569.

Refusal to set aside, *Lumber Co. v. Grizzard*, 561.

ENVIRONMENTAL MANAGEMENT

Yadkin river as capacity use area, *High Rock Lake Assoc. v. Environmental Management Comm.*, 275.

EXPRESSION OF OPINION

Explanation of denial of assigned counsel, *S. v. Atkinson*, 683.

FALSE ARREST

Claim barred by statute of limitations, *Jones v. City of Greensboro*, 571.

FINGERPRINT CARDS

Admissible, *S. v. Daniels*, 294.

FLIGHT

Admissibility of other crimes to show, *S. v. Jacobs*, 324.

FOOTBALL PARKING LOT

University's rental to corporation, portion exempt from taxation, *In re Wake Forest University*, 516.

FORGERY

Obtaining drugs with forged prescription, *S. v. Lee*, 344.

Presumption that defendant forged check, *S. v. Roberts*, 221.

FRAUD

Misrepresentation of amount of land sold, *Hawks v. Brindle*, 19.

GIFTS

Chief executive's gifts to employee, *Pallet Co. v. Wood*, 702.

HAIL INSURANCE

Other insurance clause, *N.C. Grange Ins. Co. v. Johnson*, 447.

HANDWRITING SAMPLES

Admissible, *S. v. Daniels*, 294.

HEARSAY

Statement by one robber to victim was not, *S. v. Cleveland*, 159.

HIGHWAY RIGHT-OF-WAY

Sale of land subject to, *Hawks v. Brindle*, 19.

IDENTIFICATION OF DEFENDANT

In-court identification not tainted by improper out-of-court identification, *State v. Snowden*, 511.

ILLEGITIMATE CHILDREN

Failure to support, acquittal in criminal case not res judicata in civil action, *Stephens v. Worley*, 553.

INDECENT LIBERTIES WITH CHILDREN

Sufficiency of evidence, *S. v. Campbell*, 418.

INDICTMENT

Timeliness of motion to dismiss, *S. v. Brunson*, 413.

INDIGENT DEFENDANT

Judgment for counsel fees, necessity of notice and hearing, *S. v. Washington*, 458.

INFORMANT

Disclosure required where informant was present during drug sale, *S. v. Hodges*, 229.

INHERITANCE TAXES

Property not passing as result of valid dissent to will, *Greene v. Lynch, Sec. of Revenue*, 665.

INNER TUBE

Negligent installation of, *Walters v. Tire Sales & Service*, 378.

IN PERSONAM JURISDICTION

Wrongful removal of child from this State, *Fungaroli v. Fungaroli*, 363.

INVESTIGATORY STOP

Reasonable suspicion of criminal activity, *S. v. Douglas*, 594.

INVOLUNTARY MANSLAUGHTER

Earlier pointing of gun at third person, *S. v. McAdams*, 140.

Erroneous submission in murder case, *S. v. Cason*, 144.

Shooting of wife, *S. v. McAdams*, 140.

JURY

Beginning selection with only eleven prospective jurors, harmless error, *S. v. Campbell*, 418.

Failure to impanel as prejudicial error, *S. v. Stephens*, 244.

Improper method of selection, harmless error, *S. v. Stephens*, 244.

JUVENILE DELINQUENCY

Insufficiency of evidence, *In re Meaut*, 153.

Throwing rocks at automobiles, *In re Meaut*, 153.

KIDNAPPING

Sufficiency of evidence, 190.

LANDLORD'S LIEN

Tenant's sale of tobacco, *Sugg v. Parrish*, 630.

LARCENY

Acquittal of felonious breaking or entering precludes conviction of felonious larceny, *S. v. Cornell*, 108.

Blank company checks, *S. v. Daniels*, 294.

Larceny of firearm, instructions proper, *S. v. Robinson*, 567.

LAST CLEAR CHANCE

Evidence sufficient, *S. v. Cornell*, 108.

LAUNDROMAT

Defective electric cord on floor, *Cantey v. Barnes*, 356.

LAW OF THE CASE

Dismissal of negligence claim, *Duffer v. Dodge, Inc.*, 129.

LIBEL AND SLANDER

Absolute privilege attached to warrant, *Jones v. City of Greensboro*, 571.

Claim barred by statute of limitations, *Jones v. City of Greensboro*, 571.

LIGHTNING

Insurer's negligent repair of damage, *Murray v. Insurance Co.*, 10.

MALICIOUS PROSECUTION

Invalid warrant, *Jones v. City of Greensboro*, 571.

MARIJUANA

Sufficiency of evidence of manufacture, *S. v. Whitfield*, 241; *S. v. Owen*, 429.

MECHANICS' LIEN

Foreclosure sale to person who failed to pay for repairs, *Financial Corp. v. Harnett Transfer*, 1.

MENTAL CAPACITY

Capacity to stand trial, absence of hearing following second examination, *S. v. Jacobs*, 324.

MOBILE HOME

Building for purpose of breaking or entering statute, *S. v. Douglas*, 594.

MORTGAGE LOAN

Conspiracy to deny to plaintiffs, *Pedwell v. First Union Natl. Bank*, 236.

MORTGAGES

Breach of contract to assume, *Coley v. Eudy*, 310.

MOTION FOR NEW TRIAL

Letter to clerk of court, *Williford v. Williford*, 150.

NARCOTICS

Forged prescription, *S. v. Lee*, 344.

Manufacture of marijuana, *S. v. Donald*, 241; *S. v. Owen*, 429.

Needle marks on defendant's arm, *S. v. Lee*, 344.

Reputation of house and neighborhood for drug use, *S. v. Lee*, 344.

NEEDLE MARKS

Admissibility of testimony, *S. v. Lee*, 344.

NEGLIGENCE

Appraisal of house, *Alva v. Cloninger*, 602.

Cars changing lanes on interstate, *Trucking Co. v. Phillips*, 85.

Defective electric cord on laundromat floor, *Cantey v. Barnes*, 356.

Installation of inner tube, *Walters v. Tire Sales & Service*, 378.

Motorcycle near center of highway, *Burrow v. Jones*, 549.

Passing vehicle turning into driveway, *Spruill v. Summertin*, 453.

Tree cutting accident, *Mezzacco v. Purcell*, 42.

Use of paint sprayer, *Strickland v. Equipment Development*, 57.

NOTICE OF APPEAL

Letter to clerk of court was not, *Williford v. Williford*, 150.

ODOMETER

Damages for incorrect reading, *Duffer v. Dodge, Inc.*, 129.

OFFER OF JUDGMENT

Allowance of attorney fees as part of costs, *Yates Motor Co. v. Simmons*, 339.

ORAL LOAN

Repayment within reasonable time, *Helms v. Prikopa*, 50.

OTHER CRIMES

Admissibility to show flight, *S. v. Jacobs*, 324.

Evidence of other assault in rape case, *S. v. Rick*, 383.

Judicial error in admission, *S. v. Moore*, 26.

PAINT SPRAYER

No duty to warn concerning use, *Strickland v. Equipment Development*, 57.

PARTITION

Appeal premature, *Boyce v. Boyce*, 422.

Effect of tobacco allotment, testimony by cotenant, *Harris v. Harris*, 103.

PERSONAL JURISDICTION

Wrongful removal of child from this State, *Fungaroli v. Fungaroli*, 363.

POLICEMAN

Wearing uniform in part-time job, misrepresentation of authority, *Jones v. City of Greensboro*, 571.

PRESCRIPTION

Obtaining drugs with forged prescription, *S. v. Lee*, 344.

PRESUMPTION

Validity of presumption that defendant forged check, *S. v. Roberts*, 221.

PRISON CLOTHES

No showing that tried in uniform, *S. v. Berry*, 97.

PRIVILEGE

Absolute privilege attached to warrant, *Jones v. City of Greensboro*, 571.

PROBATION

Consent to searches by probation officer, participation by law officers in search, *S. v. Howell*, 507.

Invalid condition as to operation of vehicle, *S. v. Cooper*, 233.

PROMISSORY NOTE

Summary judgment improper where defenses alleged, *First Citizens Bank v. Holland*, 529.

PROPERTY SETTLEMENT

Payments as part of rather than alimony, *Allison v. Allison*, 622.

PSYCHIATRIC EXAMINATION

Refusal to order examination of rape victim, *S. v. Clontz*, 639.

PUNITIVE DAMAGES

Assault and battery, necessity for aggravating factors, *Shugar v. Guill*, 466.

QUOTIENT VERDICT

Failure to show agreement by jurors beforehand, *Seaman v. McQueen*, 500.

RAPE

Evidence of other assaults, *S. v. Rick*, 383.

Instruction on assault with intent to commit rape required, *S. v. Williams*, 397.

Prior rape irrelevant where consent only issue, *S. v. Pace*, 79.

Refusal to order psychiatric examination of victim, *S. v. Clontz*, 639.

RECEIVING STOLEN GOODS

Value of stereo speakers, opinion testimony, *S. v. Harper*, 493.

RECESS

Failure to instruct jury before, *S. v. Grier*, 209.

RECKLESS DRIVING

Not lesser offense of driving under influence, *S. v. Donald*, 238.

RECORD ON APPEAL

Costs of unnecessary material taxed against counsel, *S. v. Washington*, 458.

REDEVELOPMENT COMMISSION

Void exchange of property with church, *Campbell v. Church*, 393.

REPAIRS

Mechanics' lien not extinguished by foreclosure sale to debtor, *Financial Corp. v. Harnett Transfer*, 1.

RELEASE

Evidence release procured by fraud or mutual mistake, *Cunningham v. Brown*, 264.

RES IPSA LOQUITUR

Defective electric cord on laundromat floor, *Cantey v. Barnes*, 356.

RES JUDICATA

Ownership of farm property, consent judgment in divorce action, *Hill v. Lassiter*, 34.

ROBBERY

Statement by one defendant to victim not hearsay, *S. v. Cleveland*, 159.

ROOF

Security service not liable for damages from leak in, *Blue Jeans Corp. v. Pinkerton, Inc.*, 137.

SALES TAXES

Claim as trustee for Secretary of Revenue, *Carolina-Atlantic Distributors v. Teachey's Insulation*, 705.

SAVINGS ACCOUNT

Bank book not assignable, *Rosenstein v. Mechanics and Farmers Bank*, 437.

SCHOOL TEACHER

Dismissal for failure to teach pending criminal charges, *Overton v. Board of Education*, 303.

SEARCHES AND SEIZURES

Appliances in plain view in car, *S. v. Douglas*, 594.

Consent to searches by probation officer, participation by law officers in search, *S. v. Howell*, 507.

Investigatory stop, reasonable suspicion of criminal activity, *S. v. Douglas*, 594.

Items in plain view, *State v. Snowden* and *State v. Boggs*, 511; *S. v. Douglas*, 594.

Search by resident advisor of university dorm, *S. v. Keadle*, 660.

Search of person on premises searched under warrant, *S. v. Brooks*, 90.

SECOND DEGREE MURDER

Erroneous submission of involuntary manslaughter where self-defense alleged, *S. v. Cason*, 144.

SECURITY SERVICE

No liability for damages for leaky roof, *Blue Jeans Corp. v. Pinkerton, Inc.*, 137.

SEISIN

Covenant of, land subject to highway right-of-way, *Hawks v. Brindle*, 19.

SELF-DEFENSE

Assault and battery action, *S. v. Powell*, 224.

SHED

Relevancy of location in robbery case,
S. v. Coasey, 450.

SPEEDY TRIAL

Five months between service and trial, *S. v. Daniels*, 294.

Four years between offense and trial,
S. v. Watson, 369.

No denial in county with limited court sessions, *S. v. Berry*, 97.

No denial of constitutional right, *S. v. Moore*, 26.

Original indictment superseded by subsequent indictment, *S. v. Moore*, 26.

Three months between arrest and trial, *S. v. Watson*, 369.

Two years between arrest and trial, *S. v. Vaughan*, 408.

Voluntarily unavailable for trial, *S. v. Cornell*, 108.

STATUTE OF FRAUDS

Oral promise to answer for debt of another, *Bone International, Inc. v. Brooks*, 183.

STATUTE OF LIMITATIONS

Breach of warranty of automobile,
Gillespie v. American Motors Corp., 535.

Defective condition of vehicle purchased from dealer, *Gillespie v. American Motors Corp.*, 535.

Failure to convey land as promised,
Hill v. Lassiter, 34.

One-year statute for false arrest and imprisonment, *Jones v. City of Greensboro*, 571.

STEREO SPEAKERS

Felonious possession of stolen property, *S. v. Harper*, 493.

TELEPHONE CONVERSATION

Identity of defendant as caller, *S. v. Jorgenson*, 425.

TIME OF PAYMENT

Oral loan, payment within reasonable time, *Helms v. Prikopa*, 50.

TIRE BLOWOUT

Negligent installation of inner tube,
Walters v. Tire Sales & Service, 378.

TOBACCO

Sale of tobacco by tenant, *Sugg v. Parrish*, 630.

TOBACCO ALLOTMENT

Cotenant's testimony in partition proceeding, *Harris v. Harris*, 103.

TREE CUTTING ACCIDENT

No duty to warn of dangerous condition, *Mazzacco v. Purcell*, 42.

TRUCK DRIVER

Injury within scope of employment,
Smith v. Central Transport, 316.

**UNEMPLOYMENT
COMPENSATION**

Misconduct connected with work, *Yelverton v. Furniture Industries*, 215.

UNFAIR TRADE PRACTICE

Conspiracy to deny loan to plaintiffs,
Pedwell v. First Union Natl. Bank, 236.

UNIFORM COMMERCIAL CODE

Accommodation party, *Lowe v. Peeler*, 557.

VEHICLE MILEAGE ACT

Damages for incorrect odometer reading, *Duffer v. Dodge, Inc.*, 129.

VERDICT

Failure to show quotient verdict, *Seaman v. McQueen*, 500.

WARRANT

Amendment in death by vehicle case, *S. v. Clements*, 113.

WARRANTIES

Statute of limitations for breach of warranty of automobile, *Gillespie v. American Motors Corp.*, 535.

WILLS

Spouse's election to take precludes dissent, *Hill v. Smith*, 670.

WORKERS' COMPENSATION

Assault by fellow employee, *Yelverton v. Furniture Co.*, 675.

Driving truck as assistant to regular driver, injuries within course of employment, *McNinch v. Henredon Industries*, 250.

Intoxication not cause of accident, *Smith v. Central Transport*, 316.

Partial disability of policeman, *Mayo v. City of Washington*, 402.

Total and permanent disability following partial disability, *Smith v. American and Efird Mills*, 480.

Tractor-trailer driver as carrier's employee, *Smith v. Central Transport*, 316.

WRONGFUL DEATH

Tractor-trailer accident, *Trucking Co. v. Phillips*, 85.

YADKIN RIVER BASIN

Failure to declare as capacity use area, *High Rock Lake Assoc. v. Environmental Management Comm.*, 275.

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